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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

FRANK MCNEIL, *et al.*,
Petitioners,

v.

SPRINGFIELD PARK DISTRICT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FRANK R. PARKER
ROBERT B. MCDUFF *
BRENDA WRIGHT
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1400 Eye Street, N.W., Suite 400
Washington, D.C. 20005
(202) 371-1212

JAMES C. CRAVEN
DONALD M. CRAVEN
1005 North 7th Street
Springfield, IL 62705-1207
(217) 544-1777
Attorneys for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

The Court of Appeals held that minority citizens have no right to bring a claim under the Voting Rights Act of unlawful racial discrimination stemming from the use of at-large elections when those citizens would not constitute a majority of the voting age population in any district of a remedial single-member districting plan. Thus, the court affirmed a grant of summary judgment against the black plaintiffs on the basis of a *per se* rule which says that, with anything less than 50% of the voting age population, black citizens could not elect candidates of their choice even if the at-large system were abolished. The court interpreted this Court's opinion in *Thornburg v. Gingles*, 478 U.S. 30 (1986), to preclude consideration of any other circumstances, including the fact that black citizens in this case would constitute a majority of the total population of a single-member district, and that prior election returns indicate a consistent pattern of black victories in the precincts composing the proposed district.

The question presented is:

Whether minority citizens are precluded automatically from challenging at-large election systems under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, solely because they would not constitute a majority of the voting age population in any district of a proposed single-member districting plan, and without any consideration of other factors demonstrating a dilution of minority voting strength.

LIST OF PARTIES

The parties in this Court are as follows:

Petitioners: Frank McNeil, William H. Washington, Sr., Rudolph V. Davenport, Archie Lawrence, and Howard Veal, Sr.

Respondent: Springfield Park District.

In the court from whose judgment review is sought, the petitioners were appellants and the respondent was an appellee. The only party in the court below which is not named as a party in this Court is the Springfield School District No. 186, whose election system has been changed since the decision of the court below, and against which any dispute is now moot.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Frank McNeil, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this case on July 8, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 851 F.2d 937 (7th Cir. 1988), and is reprinted in the appendix to this petition, p. 1a. The opinion of the United States District Court for the Central District of Illinois is reported at 666 F. Supp. 1208 (C.D. Ill. 1987), and is reprinted in the appendix, p. 22a.

JURISDICTION

The judgment of the Court of Appeals was entered on July 8, 1988, and is reprinted in the appendix, p. 34a. A timely petition for rehearing in the Court of Appeals was denied on September 21, 1988, and the order denying rehearing is reprinted in the appendix, p. 36a. On December 12, 1988, Justice Stevens entered an order extending the time for filing this petition to February 18, 1989.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 2 of the Voting Rights Act, codified at 42 U.S.C. § 1973:

> (a) No voting qualification or prerequisite to voting, standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title (which applies the Act's protection to members of any language minority), as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance that may be considered: *Provided*, That

nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT OF THE CASE

This petition seeks review of a decision of the United States Court of Appeals for the Seventh Circuit affirming a District Court grant of summary judgment against the petitioners, five black registered voters of Springfield, Illinois, in their racial discrimination challenge to at-large elections for the seven-member board of the Springfield Park District.[1]

The class action case was filed in the United States District Court for the Central District of Illinois on January 20, 1987. The plaintiffs alleged that the at-large election system violated Section 2 of the Voting Rights Act of 1965, as amended in 1982, 42 U.S.C. § 1973, and invoked the District Court's jurisdiction pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1331, and 28 U.S.C. § 1343(3). The lawsuits were filed just eight days after the Chief Judge of the District Court held that at-large voting for the Springfield City Council, whose members were elected from an area which covers nearly all of the territory of the Springfield Park District, diluted black voting strength in violation of Section 2. *McNeil v. City of Springfield*, 658 F. Supp. 1015 (C.D. Ill.), *petition for writ of mandamus denied and appeal dismissed*, 818 F.2d 565 (7th Cir. 1987).

Historically, the Springfield Park District board has been all white, and no black citizen has ever been elected

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[1] The Court of Appeals and District Court decisions disposed in the same fashion of a consolidated case, also brought by petitioners, challenging at-large elections for the board of the Springfield School District. However, subsequent to the Court of Appeals' decision, the school district abandoned the at-large system, rendering that portion of the case moot and leaving only the park district elections at issue.

to the board. As the District Court found in the city council case, Springfield is characterized by persistent racially polarized voting in elections, 658 F. Supp. at 1029, 1033, a low electoral success rate for black candidates, *id.* at 1020-1021, 1031, vast socioeconomic disparities between the races, *id.* at 1026-1027, 1032, a history of racial discrimination and segregation, *id.* at 1026-1027, the use of large election districts for at-large voting, *id.* at 1030, and the absence of "a great deal of responsiveness to black needs on the part of the white majority." *Id.* at 1032.

After the park district case was filed, the defendant moved for summary judgment. The primary basis for the motion was that, in the event a single-member redistricting plan of seven districts were instituted, the overall black population would not be sufficiently large and geographically compact to form a voting age population majority in any of the districts, although one of the districts would be majority black in *total* population. The proposed single-member district would be approximately 50.4% black in total population and 43.7% black in voting age population. Without a 50% voting age population single-member district, contended the defendant, black voters would not have the potential to elect candidates of their choice even absent the at-large system, and therefore the at-large system does not cause any impairment of black voting strength.

Plaintiffs responded with affidavits showing that even in the absence of a black voting age population majority, black voters would be able to elect candidates of their choice in the proposed majority black total population single-member district. Appendix of Appellants in the Court of Appeals at 5, 16-17, 49-51, 67. Plaintiffs' expert witness in his affidavit analyzed a number of park board, school board, and similar elections in which black candidates, supported by the vast majority of black voters, lost due to racially polarized voting in at-large elections,

but consistently came in first *in the exact precincts* composing the proposed single-member district. *Id.* at 16-17, 49-51, 67. The analysis of the plaintiffs' expert also indicated that, while substantial racially polarized voting has existed and continues to exist in Springfield, there is a small level of white crossover voting for black candidates which exceeds black crossover voting for white candidates. This would make it possible for black voters to elect candidates of their choice with the help of white crossover voting in a single-member district *even though* the voting age population would be under 50% black. *Id.* at 5, 16-17, 22-23, 29.[2] Finally, the affidavit of plaintiffs' expert noted that candidates can win election to the Springfield park board with a plurality of the vote inasmuch as no majority vote requirement exists, *id.* at 49-54, thus enhancing the ability of black citizens to elect candidates of choice in a district under 50% black voting age population.

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[2] The polarized voting analysis in the record in the present case is comprised in part of the analysis presented in the Springfield city council case, where the District Court credited the analysis and found "marked degrees of racial polarization in Springfield's local elections" and "the existence of substantial racially polarized voting." *McNeil v. City of Springfield*, 658 F. Supp. at 1029, 1033. The fact that some small level of white crossover voting exists and may help black voters elect candidates of their choice in the single-member district does not detract from the presence of an overall pattern of racially polarized voting which would be necessary to plaintiff's proof if and when they are given a trial on the merits. According to an analysis of Springfield elections contained in the affidavit of the plaintiffs' expert, approximately 24% of the white voters voted for the black candidate. Appendix of Appellants in the Court of Appeals, at 22-23, 29. While this is enough to enable black candidates to win in the proposed single-member district, it is not enough for victory in the at-large system. Moreover, it is not enough to disprove an overall showing of polarized voting, inasmuch as this level of crossover voting is lower than that in the majority of the elections cited by this Court in *Thornburg v. Gingles*, 478 U.S. 30, 80-82 (1986), when it affirmed findings of polarized voting in North Carolina legislative elections.

However, the District Court granted the motion for summary judgment on the ground that no majority black voting age population district could be created, and failed to give any consideration to the showing of black ability to elect candidates in the proposed single-member district. *McNeil v. Springfield Park District*, 666 F. Supp. 1208 (C.D. Ill. 1987); app., p. 22a. The District Court held that summary judgment was mandated by this Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and interpreted *Gingles* to prohibit an examination of any factors other than the fact that the voting age population was under 50%. 666 F. Supp. at 1212-1213; app. at 31a. Said the District Court: "At this point, it is strictly a numbers game and no other factors need be examined." *Id.* at 1212; app. at 31a.

The Court of Appeals for the Seventh Circuit affirmed. *McNeil v. Springfield Park District*, 851 F.2d 937 (7th Cir. 1988); app., p. 1a. The court noted that nothing in the legislative history of Congress' 1982 amendment to Section 2, and nothing in the pre-1980 case law which Congress codified with the 1982 amendment, suggested that a 50% voting age population single-member district minimum is necessary for a vote dilution case to survive summary judgment. *Id.* at 940-941; app. at 6a-8a. Thus, said the court, prior to the 1986 opinion in *Gingles*, summary judgment probably would have been inappropriate. "In the absence of *Gingles*, appellants might have good reason to claim that summary judgment . . . is improper . . . ." *Id.* at 941; app. at 8a.

According to the Seventh Circuit, all of that changed with *Gingles*, which the Court of Appeals said "reworked the standard" from that which Congress had incorporated into the statute with the 1982 amendment. *Id.* at 942; app. at 8a. The Seventh Circuit interpreted *Gingles*' so-called "rework[ing]" of the Section 2 standard to require an absolute 50% voting age population minimum in a proposed single-member district for any voting

rights claim to survive summary judgment. If that threshold cannot be met, said the Court of Appeals, black plaintiffs automatically lose no matter the other facts and circumstances, and no matter that black voters would be able to elect candidates of choice from the just-under 50% black voting age population district. *Id.* at 943; app. at 11a.

The Court of Appeals recognized that the irrebutable *per se* rule which it attributed to *Gingles* would foreclose potentially meritorious voting rights claims in the pursuit of judicial economy:

> In fashioning a clear regime for a prima facie Section 2 case, *Gingles* precludes some small and unconcentrated minority groups from attempting to rectify vote dilution even though they have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

Id. at 942; app. at 9a. The court explained further:

> [A]lthough *in this case the Gingles criteria might conceivably foreclose a meritorious claim,* in general they will ensure that violations for which an effective remedy exists will be considered while appropriately closing the courthouse to marginal cases. In making that trade-off, the *Gingles* majority justifiably sacrificed some claims to protect stronger claims and promote judicial economy.

Id. at 942-943; app. at 10a-11a (emphasis added, footnote omitted). The Seventh Circuit concluded its opinion by stating that Gingles "cuts rough justice." *Id.* at 947; app. at 21a.

REASONS FOR GRANTING THE WRIT

In *Gingles*, this Court specifically left unresolved the important question of whether an at-large election challenge can be maintained by minority citizens who would

comprise just less than a majority of the voting age population in the most heavily concentrated minority district in a proposed single-member plan. 478 U.S. at 46-47 n.12, and 48-50; *id.* at 89-90 n.1 (O'Connor, J., concurring). As Justice O'Connor's concurrence noted, the issue was not even presented in *Gingles*. *Id.* at 89-90 n.1. By contrast, the present case presents the issue squarely.

The Seventh Circuit's holding in this case is the most prominent of an increasing number of decisions suggesting that *Gingles* has created an irrebuttable rule that minority citizens cannot challenge at-large election systems where the alternative would be single-member districts in which they would be less than 50% of the voting age population. Although *Gingles* did not decide the propriety of such a rule, much of its reasoning suggests the rule is wrong, particularly that portion of *Gingles* which states that additional factors other than voting age percentages are relevant to the determination of an ability to elect. *Id.* at 55-56. Moreover, nothing in the detailed legislative history of Congress' 1982 amendment to Section 2 mandates or even hints at such a rule, and Section 2's requirement that courts consider the "totality of circumstances" militates strongly against the type of *per se* standard the Seventh Circuit has created.

Because this issue will continue to arise in a large number of voting rights cases, and will affect minority voters in jurisdictions throughout the nation, it constitutes an important question of federal law which should be settled by this Court.

This portion of the petition will be divided into three sections. The first will review the *Gingles* opinion, showing that it left the issue unresolved, but also showing that much of its reasoning is at odds with the Seventh Circuit's decision in the present case. The second will demonstrate that the Seventh Circuit's resolution of the issue conflicts with the intent of Congress in amending Section 2 of the Voting Rights Act in 1982. The third

will discuss how the lower courts generally have interpreted *Gingles* in a way that threatens to shut the courthouse door on a large number of minority voters, and will show that this important question about the scope of the Voting Rights Act is likely to recur frequently.

I. THIS CASE PRESENTS A QUESTION OF FEDERAL LAW WHICH HAS YET TO BE RESOLVED BY THIS COURT, AND WHICH WAS SPECIFICALLY LEFT OPEN IN *THORNBURG v. GINGLES*.

In 1982, Congress amended Section 2 of the Voting Rights Act to discard any requirement of proving intent in vote dilution cases and to prohibit electoral systems that have a racially discriminatory impact. S. Rep. No. 97-417, 97th Cong., 2d Sess., at 2 (1982) (report of the Senate Judiciary Committee on the 1982 Voting Rights Act Extension), *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 179 (hereinafter referred to as "Senate Report"). As amended, the statute outlaws any electoral system that results in minority citizens having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," and requires courts evaluating claims to consider "the totality of circumstances." 42 U.S.C. § 1973.

The only case so far in which this Court has interpreted the amended Section 2 is *Thornburg v. Gingles*, which involved a challenge to at-large voting in various multi-member North Carolina legislative districts. In reviewing the particular claims in that case, Justice Brennan's opinion for the Court laid out the following circumstances that generally form the basis of a vote dilution challenge:

> [U]nless there is a conjunction of the following circumstances, the use of multimember districts *generally* will not impede the ability of minority voters to elect representatives of their choice. Stated suc-

> cinctly, a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group.

Id. at 48-49 (first emphasis added, second in original). The opinion then gave three reasons why those circumstances are important, and described the first reason—which is at issue in this case—as follows:

> These [aforementioned] circumstances are necessary preconditions for multimember districts to operate to impair minority voters' ability to elect representatives of their choice for the following *reasons*. First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the *multi-member form* of the district cannot be responsible for minority voters' inability to elect its candidates.

Id. at 50 (first emphasis added; second in original).[3]

With respect to this first reason, the opinion delineated the justification for this focus on the size and compactness of the minority population:

> Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.

Id. at 50, n.17 (emphasis in original). The Court also said:

> We have no occasion to consider whether Section 2 permits, and if it does, what standards should per-

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[3] The second of the three reasons listed by the Court dealt with minority political cohesiveness and bloc voting, and the third focused on whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidate. 478 U.S. at 51, 56. Neither of the latter two reasons are at issue in this appeal, inasmuch as plaintiffs have never had a trial on these matters.

> tain to, a claim brought by a minority group, which is not sufficiently large and geographically compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability *to influence* elections.

Id. at 46-47, n.12 (emphasis in original).

Clearly, the opinion did not set out an ironclad 50% voting age population minimum for survival of any and all at-large challenges. Indeed, footnote 12 specifically left open the issue of whether a Section 2 at-large challenge can be maintained by minority voters who would comprise less than a majority in a single-member district.[4]

Moreover, at the beginning of the entire discussion of the three-step analysis, the Court stated, "unless there is a conjunction of the following cincumstances, the use of multimember districts *generally* will not impede the ability of minority voters to elect representatives of their choice." *Id.* at 48 (emphasis added). By using the qualifier "generally," the opinion obviously left open the possibility that multimember districts might, in some situations, impede minority electoral ability even without an absolute voting age majority in a potential single-member district.

In addition, the Court described the three steps of the *Gingles* analysis not as automatic prerequisites, but as "reasons" why multimember districts generally will not

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[4] Footnote 12 referred to the possibility of a claim by minority voters who contend their ability "to influence" elections has been impaired by at-large elections, as opposed to their ability "to elect" candidates of their choice. The plaintiffs in the present case contend, and the evidence demonstrates, that they can elect candidates of their choice from the proposed single-member district. Whatever nomenclature is used in such a situation, the important point is that footnote 12 left unresolved the issue of whether minority voters can proceed with a claim under Section 2 where they would be less than 50% of a proposed single-member district.

impede black voting strength unless bloc voting defeats candidates supported by a cohesive and geographically insular minority group. *Id.* at 48-50. And in the passage where the opinion did use the word "majority," it never specified that it was talking about a majority of voting age population, as opposed to total population. In the present case, black citizens would constitute a majority of the total population in the single-member district, but not of voting age population.

All of these points demonstrate that *Gingles* left open the question posed in the present case. This is all the more apparent in light of the Court's stated reason for focusing on the size and compactness of the minority group, which is that the group must show the "*potential* to elect" candidates of choice in the absence of the challenged electoral system. *Id.* at 50 n.17 (emphasis in original). As the opinion later noted, additional factors other than the black voting age population of a district are relevant to determining potential ability to elect in that district—factors such as crossover voting patterns and the presence or absence of a majority vote requirement. *Id.* at 55-56.[5] This is in line with the Court's recognition, *id.* at 45, of Congress' command to take a "functional" view of the political process in a given jurisdiction, rather than relying upon any "formalistic" concept. Senate Report at 30 n.120.[6]

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[5] The Court said that the threshold level of black voters' ability to elect representatives of their choice is dependent on the extent of bloc voting, and "will vary from district to district according to a number of factors, including the nature of the allegedly dilutive electoral mechanism; the presence or absence of other potentially dilutive electoral devices, such as majority vote requirements, designated posts, and prohibitions against bullet voting; the percentage of registered voters in the district who are members of the minority group; the size of the district; and, in multimember districts, the number of seats open and the number of candidates in the field." 478 U.S. at 56.

[6] Certainly, plaintiffs in other cases who do establish the ability to create a single-member district composed of a majority of minor-

Here is where the Seventh Circuit's minimum 50% voting age population standard is at odds with the reasoning of *Gingles*. Had the lower courts in this case taken the required "functional" view of the political process, and looked at the factors *Gingles* said are important in analyzing ability to elect, those courts would have discovered that black citizens in Springfield truly do have an ability to elect candidates of choice from the proposed district. They would have discovered election returns showing consistent black victories in the precincts comprising the proposed district. They would have discovered a small level of white crossover voting that exceeds black crossover voting and that can assist in the election of black-supported candidates in the proposed district. And they would have discovered that the absence of a majority vote requirement increases the electoral chances of black-supported candidates, even in a district just under 50% black voting age population, since a plurality is all that is necessary to win. Indeed, the absence of a majority vote requirement is one of the factors that makes the present case very different from *Gingles*, where a majority of the vote was necessary to win election in North Carolina's legislative districts. 478 U.S. at 39.

From all of this, it is very clear that the proposed district would give black voters in Springfield an opportunity to elect candidates of their choice. If plaintiffs can prove at trial that the at-large system forecloses that opportunity, then they certainly will have satisfied *Gingles*' rationale and demonstrated that the multi-

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ity citizens have demonstrated, for liability purposes under Section 2, a potential to elect and have satisfied the *Gingles* rationale. Thus, when *Gingles* spoke of a "majority" in a single-member district, it referred to the typical way to demonstrate that potential. But it is also true that the potential can exist with something less than a majority, and plaintiffs should be able to point to other electoral factors that prove the potential to elect would exist in the absence of the at-large system.

member form of the district is responsible for black voters' inability to elect candidates. 478 U.S. at 50.[7] By ignoring this rationale, by taking a formalistic rather than a functional view, and by considering no evidence concerning the factors *Gingles* identified as crucial in determining ability to elect, the Seventh Circuit's opinion—and the mechanistic rule propounded by that opinion—is at odds with much of the reasoning in *Gingles*.

In addition, the Seventh Circuit attributed to *Gingles* a desire to eliminate potentially meritorious voting rights claims in what the Court of Appeals called a "trade-off" to promote judicial economy. 851 F.2d at 942-943; app. at 10a-11a. There is simply nothing in *Gingles* to suggest such a motive on the part of this Court, and the Seventh Circuit's misreading distorts *Gingles* out of all recognition.

It is important to note that the concurring opinion of four justices in *Gingles*, authored by Justice O'Connor, expressed "no view as to whether the ability of a minority group to constitute a majority in a single-member district should constitute a threshold requirement" for a Section 2 claim. *Id.* at 89-90 n.1 (O'Connor, J., concurring). Justice O'Connor's opinion said the issue need not be decided because "the plaintiffs in this case would

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[7] Of course, it may be that summary judgment would be appropriate against plaintiffs in some cases, where all of the relevant circumstances demonstrate that their voting strength under a potential remedial plan would be too small to make any qualitative difference in terms of their electoral abilities. In such cases, it truly could be said that the existing multimember form was not the cause of an inability to elect candidates of choice, and the rationale of *Gingles* would be met. But courts should examine that level of voting strength, and not mechanically apply a 50% voting age population figure to exclude plaintiffs on summary judgment. Where, as here, plaintiffs respond to the summary judgment motion by demonstrating that they do possess the potential to elect in the proposed district, or at least raise a genuine issue of fact on the subject, they are entitled to a trial.

meet that requirement, if indeed it exists." Justice O'Connor seemed to indicate that such a requirement should not be imposed:

> [T]he Court recognizes that when the candidates preferred by a minority group are elected in a multi-member district, the minority group has *elected* those candidates, even if white support was indispensable to these victories. On the same reasoning, if a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members–prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice.

Id. (emphasis in original).

As all of the foregoing indicates, the Court's opinions in *Gingles* did not resolve the issue in the present case, and much of the reasoning in *Gingles* is contrary to the Seventh Circuit's resolution of the issue. The next subsection of this petition will demonstrate that the Seventh Circuit's resolution also conflicts with the intention of Congress in amending Section 2 in 1982.

II. THE SEVENTH CIRCUIT'S STRICT LIMITATION OF THE SCOPE OF THE VOTING RIGHTS ACT CONTRAVENES THE INTENT OF CONGRESS WHEN IT AMENDED SECTION 2 OF THE ACT IN 1982.

The absolute and mechanistic standard formulated by the Seventh Circuit is totally contrary to the intent of Congress when it passed, by an overwhelming vote, the 1982 amendment strengthening the protections of Section 2 of the Voting Rights Act. The Seventh Circuit's standard is nowhere to be found in the legislative history, is at odds with the statute's requirement that courts con-

sider the "totality of circumstances" and Congress' insistence on a "functional" view of the political process, and is absent from the pre-1980 case law which Congress codified into the amended Section 2. Each of these points will be addressed in turn and in more detail.

The legislative history of the 1982 amendment discussed in great detail the evidentiary standards that should govern the federal courts' review of vote dilution challenges to electoral systems, even to the point of listing the nine typical evidentiary factors that will be dispositive in most cases. Senate Report at 28-29. But nowhere in the legislative history is there any suggestion that a 50% voting age population minimum in a single-member district is an absolute prerequisite to a Section 2 case.

Moreover, the statute itself, as amended, requires courts to consider the "totality of circumstances." The legislative history prescribes a "functional view" of the political process as opposed to a "formalistic" view, Senate Report at 30 n.120, and requires "a searching practical evaluation of the 'past and present reality' " in the challenged jurisdiction. *Id.* at 30, *quoting White v. Regester*, 412 U.S. 755, 769-770 (1973). The Seventh Circuit's rule, by contrast, considers not the totality of the circumstances, and not the reality of electoral politics in the jurisdiction, but instead commands an unalterable and formalistic demographic standard which, if not met, automatically requires summary judgment against minority plaintiffs.

Under the Seventh Circuit's rule, courts are not entitled to consider the type of facts that exist in the present case—that the proposed single-member district is majority black in total population, that black candidates consistently win in the very precincts that would compose this single-member district, that some small level of white crossover voting may help black candidates win,

and that a plurality of the vote is all that is necessary to win election to the governmental board under challenge. The inability of courts, under the Seventh Circuit's standard, even to take these factors into account in deciding whether plaintiffs are entitled to a trial is patently inconsistent with Congress' emphasis on the totality of the circumstances and the electoral reality of the jurisdiction.

A common-sense, functional view of the issue, as Congress has prescribed, shows just how wrong the Seventh Circuit is. Minority citizens in many communities, burdened by a history of racial discrimination and by its modern manifestation, racially polarized voting, are unable to exert any political strength because they are so submerged in an at-large setting. Yet they would be much better off and could exercise some level of electoral strength when their percentage is heightened in a single-member district, even if the best possible single-member district is slightly under 50% voting age population. The Seventh Circuit rule, however, fails to take this into account, automatically consigning those minority citizens to the racially discriminatory features of at-large elections in the situations where they cannot exceed the 50% voting age population level. This hardly comports with the functional and realistic view Congress requires.

In addition, the legislative history shows that Congress specifically intended to incorporate into Section 2 the standards of vote dilution law that existed prior to 1980, standards exemplified by the analyses in *White v. Regester* and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976). Senate Report at 27-28 and n.113. As the Seventh Circuit recognized, neither *White* nor *Zimmer* mentioned any requirement similar to that which the Seventh Circuit imposed. 851 F.2d at 941. Given that the Seventh Circuit's limitation on the scope of vote dilution challenges never

existed prior to 1980, it is clear that Congress in 1982 intended no such limitation. The sole purpose of the 1982 Congressional amendment to Section 2 was to strengthen the Voting Rights Act and expand the vote dilution concept, and not to limit it in any way. *See* Senate Report at 2.

Indeed, the Seventh Circuit's opinion candidly acknowledged that summary judgment in cases like this may well be improper if only the intent of Congress is examined. 851 F.2d at 941; app. at 6a-8a. The Court of Appeals' sole basis for promulgating its rule, and limiting the scope of the Voting Rights Act, is its reliance upon what it called this Court's "rework[ing]" in *Gingles* of the Section 2 standard from that imposed by Congress. However, as demonstrated in Section I of this petition, *Gingles* does not require the unalterable standard which the Seventh Circuit attributes to it.

Having demonstrated in Section I that *Gingles* has left this issue open, and in Section II that the Seventh Circuit's resolution is inconsistent with Congressional intent, this petition will now turn to a discussion of the importance of this issue, and the frequency with which it arises in the federal courts.

III. THE QUESTION IN THIS CASE REGARDING THE SCOPE OF THE VOTING RIGHTS ACT IS AN IMPORTANT AND RECURRING ISSUE WHICH WILL AFFECT A LARGE NUMBER OF MINORITY VOTERS IN VARIOUS JURISDICTIONS THROUGHOUT THE NATION.

The Court of Appeals' decision in the present case is the most prominent of a number of recent federal court decisions interpreting *Gingles* to require a minimum 50% voting age population threshold. In addition, the issue is present and yet to be resolved in a number of pending voting rights cases. Taken together, all of these cases demonstrate that the issue is likely to recur and that the

rights of a significant number of minority voters in jurisdictions throughout the country hinge on the ultimate resolution of this question about the scope of the Voting Rights Act.

Among the growing number of federal court decisions which are in agreement with the Seventh Circuit, and which appear to require a 50% voting age population minimum in order to maintain a racial vote dilution claim under the Act, are the following: *Solomon v. Liberty County, Florida*, No. 87-3406, slip op. at 13-14 (11th Cir. Dec. 12, 1988) (holding that 50% voting age population rather than 50% total population constitutes the minimum threshold, and citing the Seventh Circuit's *McNeil* decision with approval); *McDaniels v. Mehfoud*, No. 88-0020-R, slip op. at 9 (E.D. Va. Dec. 30, 1988) (citing *McNeil* for the proposition that plaintiffs must demonstrate that they can constitute a 50% voting age population single-member district); *Armour v. State of Ohio*, No. C88-1104Y, slip op. at 5-7 (N.D. Ohio, Nov. 4, 1988), *appeal pending*, No. 88-4040 (6th Cir.) (relying on *McNeil* in holding against plaintiffs because of the absence of a 50% voting age population minimum without regard to any other electoral facts and circumstances); *Brewer v. Ham*, No. W-87-CA-015, slip op. at 6-7 (W.D. Tex. May 12, 1988), *appeal pending*, No. 88-1401 (5th Cir.) (ruling against minority plaintiffs and holding that they failed to meet the requirements of *Gingles* because—even though a 55.91% total population minority district could be created—plaintiffs did not prove that the district would exceed 50% minority in voting age population); *Williams v. State Board of Elections*, 696 F. Supp. 1563, 1566 (N.D. Ill. 1988) (granting, in part, motion to dismiss because hispanics could not form a majority in a single-member district); *Romero v. City of Pomona, California*, 665 F. Supp. 853, 858 (C.D. Cal. 1987) (denying plaintiffs' Section 2 claim and holding that black plaintiffs failed to meet the requirements of *Gingles* with a 51% total population district, while his-

panic plaintiffs failed with a 60% total population district, because the districts would be less than 50% minority when voting age population and citizenship were taken into account); *Martin v. Allain*, 658 F. Supp. 1183, 1204 (S.D. Miss. 1987) (ruling against plaintiffs, in reliance upon *Gingles*, in those multimember districts where black citizens could not constitute single-member voting age population majorities). *See also*, *McGhee v. Granville County*, 860 F.2d 110, 119 (4th Cir. 1988) (agreeing with the reasoning of the Seventh Circuit in *McNeil*, although not confronting the same issue).

Related issues have arised in some of these cases about whether *Gingles* mandates, as a minimal threshold, not only proof of a 50% voting age population, but also proof of at least 50% of the registered voters in the proposed district, and proof that minority voters can control the proposed district politically. *See Solomon v. Liberty County, Florida*, slip op. at 13-14 and n.10 (District Court ruled against black plaintiffs because blacks were only 46% of the registered voters of the proposed district, but Court of Appeals reversed because blacks were 51% of the voting age population; Court of Appeals also said that white crossover voting could give the district "an effective black majority," leaving no need to decide whether plaintiffs "must show effective control of the district or merely a mathematical majority"); *McDaniels v. Mehfoud*, slip op. at 8-9 (holding that 50% voting age population is the minimum requirement, but that plaintiffs "need not demonstrate that blacks could comprise a majority of those actually turning out to vote"). *See also*, *Romero v. City of Pomona, California*, 665 F. Supp. at 858 (hispanic plaintiffs must prove not only that they are over 50% voting age population, but also that they are over 50% voting age population in terms of born or naturalized citizens after excluding resident and undocumented aliens).

Although the Seventh Circuit's decision in the present case represents the definite trend among the courts which have confronted the issue, some disagreement does exist. *See East Jefferson Coalition v. Parish of Jefferson*, 691 F. Supp. 991, 1005-1008 (E.D. La. 1988) (a Section 2 claim may be maintained by minority citizens even if they cannot form a majority in a single-member district, so long as the district will provide them with "the ability to influence elections"). Indeed, the Seventh Circuit's decision is already the subject of scholarly criticism. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 Harv. C.R.C.L. L. Rev. 173, 206-208, 212 (1989). *See also*, Abrams, *Raising Politics Up: Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. Rev. 449, 507-508 (1988) (stating that the majority single-member district standard "has, in most cases, become a sine qua non of a Section 2 violation," and criticizing the courts' use of "this requirement as a threshold or standing inquiry").

The whole question of the threshold necessity of composing a majority voting age population in a single-member district also exists in several voting rights cases awaiting resolution in the district courts, including one case where the United States Department of Justice has brought suit claiming dilution in the districting plan for the governing board of Los Angeles County. *United States v. County of Los Angeles*, No. CV 88-5435-KN (Ex), Joint Status Report of Jan. 23, 1989 at 3-5 (C.D. Cal.) (status report states that defendant Los Angeles County intends to file a motion for summary judgment contending that a majority hispanic voting age citizen district cannot be created and relying upon the Seventh Circuit's decision in *McNeil*, and that the United States disagrees with the County's "factual and legal contentions on the issue"). *See also, Concerned Citizens of Hardee County v. Hardee County Board of Commissioners*, Nos. 86-209-CIV-T-17 and 86-1161-CIV-T-17 (M.D.

Fla. Order of Sept. 27, 1988) (defendants' motion for summary judgment on grounds of an inability to create a majority black voting age population single-member district denied in light of a factual dispute about the issue; court declines to rule on the legal question of whether such a district is necessary to maintain a Section 2 claim); *Dillard v. Crenshaw County*, No. 85-T-1332-N (M.D. Ala. Order of Sept. 7, 1987) (a number of jurisdictions in Alabama whose at-large election systems are under challenge in pending litigation contend that majority black single-member districts cannot be created and that plaintiffs' Section 2 claims are therefore without merit).

All of these cases demonstrate that the issue posed by the Seventh Circuit's decision is present in litigation involving jurisdictions in all parts of the country, from the deep south to the midwest to the west coast. The resolution of the issue will affect the voting rights of minority citizens in rural cities and counties in states like Alabama, *see Dillard v. Crenshaw County*, and in urban areas like Los Angeles. *See United States v. County of Los Angeles.* The increasing frequency of cases raising this question, and the fact that the cases include large jurisdictions such as Los Angeles County, show that the issue is not limited to a few pockets of minority voters, but is a matter that ultimately will affect a large number of black and hispanic citizens.

Moreover, the Seventh Circuit's opinion constitutes the most prominent decision on the question and is being followed and approved by a number of courts. *See McGhee v. Granville County; McDaniels v. Mehfoud; Armour v. State of Ohio.* At the same time, it is the subject of some disagreement in the lower courts and of scholarly criticism. Because of the role of the Seventh Circuit's decision in the evolution of this issue, and because of the impact of the issue on the voting rights of black and hispanic citizens in all parts of the nation, certiorari should be granted in this case.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, a writ of certiorari should issue to review the decision of the Court of Appeals in this case.

Respectfully submitted,

FRANK R. PARKER
ROBERT B. MCDUFF *
BRENDA WRIGHT
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1400 Eye Street, N.W., Suite 400
Washington, D.C. 20005
(202) 371-1212

JAMES C. CRAVEN
DONALD M. CRAVEN
1005 North 7th Street
Springfield, IL 62705-1207
(217) 544-1777
Attorneys for Petitioners

* Counsel of Record

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 87-2478

FRANK MCNEIL, et al., individually and
as representatives of a certified class,
Plaintiffs-Appellants,

v.

SPRINGFIELD PARK DISTRICT and
SPRINGFIELD SCHOOL DISTRICT NO. 186,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois, Springfield Division.
Nos. 87 C 3016 & 87 C 3017—Richard Mills, *Judge*

ARGUED FEBRUARY 10, 1988—DECIDED JULY 8, 1988

Before CUMMINGS, CUDAHY and MANION, *Circuit Judges.*

CUDAHY, *Circuit Judge.* On January 17, 1987, the district court held that the at-large system for electing members to Springfield's city council violated section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 (1982). *McNeil v. City of Springfield*, 658 F. Supp. 1015 (C.D. Ill. 1987). Plaintiffs in that case—five black registered

voters residing in Springfield—then brought this action challenging the electoral systems for the Springfield Park District and School Board.

The park district board and school board both consist of seven members who are elected at large by a plurality vote. Appendix of Appellants at 3. No black resident has ever been elected to the park board. Five blacks have been elected to the school board since 1965, filling 9.8% of the various seats available during that time. Plaintiffs claim that the multi-member voting districts dilute their voting strength,[1] impairing their ability to elect candidates of their choice, and they ask the court to divide the park and school districts into seven single-member districts, one of which would have a black majority population.[2]

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[1] "Vote dilution" refers to "the impermissible discriminatory effect that a multi-member or other districting plan has when it operates 'to cancel out or minimize the voting strength of racial groups.'" *Thornburg v. Gingles*, 106 S. Ct. 2752, 2786 (1986) (O'Connor, J., concurring in the judgment) (quoting *White v. Regester*, 412 U.S. 755, 765 (1973)).

The most commonly litigated situation leading to vote dilution is at-large districting. If voting is racially polarized, a white majority is able to consistently elect its candidates of choice, submerging the preferences of minority voters. When the district is divided into smaller single-member districts, one or more with a majority of minority group voters, the electoral results may more fully reflect societal diversity. Section 2 was intended to force modification of electoral systems evidencing historical patterns of unacceptable vote dilution.

[2] The boundaries of the school district differ slightly from the park district. According to the 1980 census, the population of the park district was 119,334, of which 11,198 (or 9.4%) were black. The population of the school district was 122,997, of which 11,217 (or 9.1%) were black. The population of appellants' proposed single-member park district would be 50.4% black, but the voting age population would be only 43.7% black, according to 1980 census figures. Similarly, while the total population of the proposed single-member school district would be 50.2% black, the voting age population would be 43.2% black.

The district court granted summary judgment for the defendants, holding that the plaintiffs failed to satisfy the "necessary preconditions" established by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752 (1986) which construed the 1982 amendments to section 2.[3] *Gingles*, like this case, involved a challenge to an at-large, or multi-member, district voting scheme. There the Court held that, in order to sustain a section 2 claim, a minority group must "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." 107 S.Ct. at 2766. If it is unable to satisfy this precondition, a minority group cannot sustain its claim that the multi-member voting scheme "operates to impair minority voters' ability to elect representatives of their choice." *Id.* Applying that test in this case, the district court granted summary judgment on the ground that appellants would not comprise a voting age majority in the proposed single-member district.

Appellants attack the district court's holding on several fronts, some of which involve the merit of *Gingles* itself. Appellants primarily contend that summary judgment is inappropriate in section 2 voting rights cases, because the statute requires courts to take a "functional" view of the challenged process and evaluate the "totality of the circumstances." Appellants also contend that *Gingles*' population requirement should not apply here because that

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[3] Section 2 of the Voting Rights Act, as amended, provides:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided by subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in

case involved a district with a majority vote requirement, while a candidate in the districts at issue here may prevail with a plurality of the vote. Alternatively, appellants maintain that, if *Gingles*' precondition warrants consideration of a motion for summary judgment, the district court erred in interpreting the precondition to require that appellants comprise a voting age majority (in contrast to a total population majority) in their proposed single-member district. Further, they argue that population growth since the 1980 census has produced a black voting age majority in the single-member district. Finally, appellants make two other arguments: first, that the court should add seats to the school and park district boards to enable blacks to comprise a voting age majority in a smaller district; second, that they should be allowed to show that the multi-member scheme impairs their ability to *influence* elections even though they cannot show that the scheme impairs their ability to *elect* candidates of their choice.

I.

Appellants' strongest argument is that summary judgment is inapproprate in section 2 cases, which generally call for substantial and complex factual determinations. This argument finds support in the text and legislative history of section 2 and in Supreme Court precedent. Indeed, both Congress and the Court have indicated that

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the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (1982).

section 2 cases require consideration of the "totality of the circumstances." *See* 42 U.S.C. § 1973(b); *Gingles*, 106 S. Ct. at 2764, 2781; *White v. Regester*, 412 U.S. 755, 769 (1973). Congress, in amending section 2, expressed its preference for "a searching practical evaluation of the 'past and present reality,'" and a "functional view of the political process." S. Rep. No. 417, 97th Cong., 2d Sess., pt. 1, at 30 & n.120 [hereinafter Report], *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 208 (quoting *White*, 412 U.S. at 769-70). Congress wanted "to restore the legal standard that governed voting rights discrimination cases prior to the Supreme Court's decision" in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which broke with precedent by requiring plaintiffs to prove discriminatory purpose to sustain their claim. Report at 16, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 192-93. The amendment to section 2 removed the intent requirement and returned to the "results" test that had been in effect before *Bolden*. 42 U.S.C. § 1973(b); *see White*, 412 U.S. at 765-66.

Prior to *Bolden*, plaintiffs could prevail by showing that a challenged election practice or procedure, under the totality of the circumstances, operated to minimize or cancel out the voting strength of a racial group. *White*, 412 U.S. at 765-66; *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971); *Burns v. Richardson*, 384 U.S. 73, 88 (1966); *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965). No discriminatory intent was required. Courts considered a variety of factors in appraising the impact of the challenged practice. *White*, 412 U.S. at 766-67; *Zimmer v. McKeithen*, 485 F.2d 1297, 1306-07 (5th Cir. 1973) (*en banc*), *aff'd sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976) (per curiam).[4]

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[4] Those factors include:

1. The extent of any history of official discrimination touching the right of minorities to register, vote, or participate in the political process;

In amending section 2, Congress instructed future courts to consider these factors in their determinations of section 2 claims. Report at 28-29, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 206-07. These factors help define the totality of the circumstances from which courts decide whether a particular scheme minimizes or cancels out minority voting strength. *Id.* at 29 n.118, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 207 n.118. Admittedly, factors other than those listed are probative of section 2 claims, but it may be worth noting that none of the enumerated factors describes the requirement that a minority group be sufficiently large and geographically cohesive to constitute a majority in a single-member district. Neither *White* nor *Zimmer*, the principal cases expressing the standard Congress meant to

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2. The extent to which voting in the elections is racially polarized;
3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. Whether members of the minority group have been denied access to the candidate slating process;
5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. Whether political campaigns have been characterized by overt or subtle racial appeals;
7. The extent to which minorities have been elected to public office in the jurisdiction;
8. Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of minorities;
9. Whether the policy underlying the state or political subdivision's voting practice or procedure is tenuous.

Report at 28-29, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 206-07.

codify, mentions such a requirement.[5] In the absence of

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[5] *White* involved a constitutional challenge to a multi-member district voting scheme. Plaintiff alleged that multi-member districts in Dallas and Bexar Counties, Texas, violated the fourteenth amendment's equal protection clause. In affirming the district court's judgment that the multi-member Dallas district was not equally open to participation by minority voters, the Court cited the following factors considered by the district court: the history of official racial discrimination in Texas, touching the right of blacks to register, vote and otherwise participate; the presence of a majority vote requirement for nomination; the facts that only two blacks from Dallas County had ever served in the state House of Representatives since Reconstruction, and that these two men were the only blacks ever slated to run for legislative office from Dallas County; the lack of responsiveness of elected officials to the needs of minorities in Dallas County; and the use of racial campaign tactics to defeat candidates supported by minority voters. *White*, 412 U.S. at 766-67. The Court did not discuss the size of the black voting community in Dallas County.

The *White* Court also upheld the district court's determination that the voting rights of hispanics in Bexar County had been violated. Despite comprising 29% of the county's total population of 800,000, hispanics had only been able to elect five of their own to the state House of Representatives since 1880, and just two from the largely hispanic "Barrio." *Id.* at 768. Given that the county sent twelve people to the state House of Representatives, hispanics easily could have had much greater representation in the state legislature if the county had been divided into single-member districts. Nevertheless, the Court chose not to emphasize the potential hispanic voting strength, instead opting to focus on the collateral, economic and language barriers to hispanic participation in the political process. *Id.* at 769. The Court noted that the Barrio was an area of poor housing, low income and high unemployment, and that cultural incompatability along with the poll tax and severely restrictive voter registration procedures effectively denied hispanics access to the political processes. *Id.*

In *Zimmer*, the Fifth Circuit held that an at-large voting scheme for parish school board and police jury elections impermissibly diluted minority voting strength. 485 F.2d at 1300. Although blacks comprised a majority (58.7%) of total population in the parish, the court emphasized that "access to the political process and not population was the barometer of dilution of minority voting strength." *Id.* at 1303. In reaching its decision, the court considered the *White*

Gingles, appellants might have good reason to claim that summary judgment based on minority population size and concentration is improper in section 2 cases.

Despite its merits, however, appellants' contention ultimately fails in light of *Thornburg v. Gingles*. *Gingles* involved a challenge to a multi-member district scheme for electing representatives to the North Carolina legislature. 106 S. Ct. at 2758. Registered black voters alleged that multi-member districts impaired their ability to elect representatives of their choice. *Id.* The district court applied the "totality of circumstances" test and, relying on the various factors considered in *White* and *Zimmer*, concluded that the multi-member districts violated section 2. *Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984) (three judge panel), *aff'd in part and rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986). After noting that blacks were "sufficient in numbers and contiguity to constitute effective voting majorities in single-member districts," *id.* at 358, the court found that North Carolina had officially discriminated against blacks with respect to their right to vote; that blacks had suffered historically from discrimination in education, housing, employment and health services; that North Carolina maintained a majority vote requirement; that white candidates had encouraged voting along color lines by appealing to racial prejudice; that very few blacks had ever held public office in the state; and that voting in the challenged districts was racially polarized. *Id.* at 359-72.

On direct appeal, the Supreme Court did not simply affirm the lower court; instead, it reworked the standard for section 2 cases. While agreeing that many or all of the *White/Zimmer* factors are relevant to a claim that

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"panoply of factors." *Id.* at 1305. The Court noted that blacks were forced to attend racially segregated schools, subjected to a literacy test to qualify to vote, and not permitted to register to vote until 1962; the Court also considered the majority vote requirement in the parish, which tended to submerge a racial minority. *Id.* at 1306.

multi-member districts violate section 2, the Court established three "necessary preconditions" that have to be met before such claims receive full consideration. *Gingles*, 106 S. Ct. at 2766. To pass the summary judgment threshold, a minority group "must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* The group must also show that it is politically cohesive and that white bloc voting usually thwarts election of the minority's preferred candidate.[6] Only upon satisfaction of these threshold criteria should a court conduct its totality-of-the-circumstances analysis and consider other relevant factors set forth in *White*. As the Court explained, "Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Id.* at 2766-67 n.17 (emphasis in original). Thus, although a section 2 claim potentially implicates many factors, the Court stated in no uncertain terms that a challenge to a multi-member district cannot be sustained unless the *Gingles* preconditions are met. We must therefore reject appellants' contention that summary judgment is improper in section 2 cases.

At least at first glance, a tension seems to exist between the Court's approach toward voting rights claims and Congress's intent in amending section 2. The Court's preconditions are not among the *White/Zimmer* factors that Congress adopted to assist courts in their section 2 analyses. In fashioning a clear regime for a prima facie section 2 case, *Gingles* precludes some small and unconcentrated minority groups from attempting to rectify vote dilution even though they have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). For instance, minorities not large and concentrated enough to comprise a majority

[6] The latter two requirements are not at issue here.

in a single-member district and therefore unable to sustain a section 2 claim under *Gingles* may nonetheless "possess the potential" to elect candidates of their choice in a single-member district with the help of a sizeable and long-standing white cross-over vote.[7]

However, given the lack of clarity with respect to the requirements for a section 2 violation, as well as the broad latitude often granted to courts having to consider the totality of the circumstances, *Gingles* is a reasonable exercise of the Court's authority in statutory interpretation. The Court's approach, by focusing up front on whether there is an effective remedy for the claimed injury, promotes ease of application without distorting the statute or the intent underlying it. It reins in the almost unbridled discretion that section 2 gives the courts, focusing the inquiry so that plaintiffs with promising claims can develop a full record. The creation of preconditions—a choice of clear rules over muddy efforts to discern equity—shields the courts from meritless claims and ensures that clearly meritorious claims will survive summary judgment. That might not always have been true had courts been allowed to consider all of the *White/Zimmer* factors at the early stages of the proceedings. Thus, although in this case the *Gingles* criteria might conceivably foreclose a meritorious claim, in general they will ensure that violations for which an effective remedy exists will be considered while appropriately closing the courthouse to marginal cases. In making that trade-off,

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[7] Somewhat ironically, a different concern led Justice O'Connor, joined by three others, to write separately. Justice O'Connor believed that the *Gingles* criteria might make it too *easy* for plaintiffs to prevail in section 2 cases, by encouraging a failure to give adequate weight to other factors. 106 S. Ct. at 2788-89 (O'Connor, J., concurring in the judgment). She warned that the *Gingles* regime would lead courts usually to require proportional representation in contravention of clear congressional intent. *Id.*; *see also* 42 U.S.C. § 1973(b) (proviso stating the statute should not be construed to require proportional representation).

the *Gingles* majority justifiably sacrificed some claims to protect stronger claims and promote judicial economy.[8] The Voting Rights Act is a crucially important piece of national legislation, *see Derrickson v. City of Danville*, No. 87-2385, slip op. at 17-18 (April 28, 1988) (Cudahy, J., concurring), but it is subject to the same considerations of effective administration as other similar statutes.

We therefore must reject appellants' contention that a court, in considering section 2 claims, must explore the totality of the circumstances without first determining whether the *Gingles* threshold criteria are met.[9] Despite the criticisms that can be made of it, *Gingles* is a reasonable interpretation of a broadly drawn statute. The decision combines the desire of Congress to remove barriers to section 2 claims with the Court's concern that without preconditions section 2 as amended might lead to a multitude of essentially irremediable claims. In any event, we

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[8] We also note that, while *White* and *Zimmer* did not require that plaintiffs show they can constitute a majority in a single-member district, plaintiffs in both cases were apparently sufficiently populous and geographically compact to satisfy this requirement. In *White*, hispanics in Bexar County, composing 29% of the county's total population, could easily have constituted a majority in a single-member district, which, because the county had twelve representatives, would have contained roughly 8.5% of the county's total population. *See White*, 412 U.S. at 768; *see also supra* pp. 6-7 n.5. Likewise, plaintiffs in *Zimmer* would no doubt have comprised a majority in a single-member district since they already had a majority in the multi-district parish. 485 F.2d at 1301. These numbers make understandable the court's broad dicta that the size of the minority population was not "the barometer of vote dilution." *Id.* at 1303. Minority voting strength was clearly present; therefore other factors became important.

[9] Because of this holding, we do not consider plaintiffs' claim that white cross-over votes would enable black candidates to prevail in the proposed districts. Cross-over voting is to be considered only after the *Gingles* prerequisites are met. The existence of a cross-over, of course, weakens *pro tanto* the assumption of racial bloc voting.

must, of course, defer to the Court's interpretation of section 2, which leads to the conclusion that summary judgment is sometimes proper in section 2 cases.[10]

II.

Appellants contend further that *Gingles* is inapposite to this case because candidates in the elections at issue in *Gingles* needed a majority of the vote to win. *Gingles*, 106 S. Ct. at 2761. Candidates for the Springfield park district and school board need only a plurality to win if more than two candidates run. In the context of *Gingles* and a majority vote requirement, the Court's requirement that a minority group constitute a majority in a single-member district makes sense. If unable to meet this precondition, minority voters do not have the potential to elect candidates of their choice.

In the context of the case before us, however, the precondition is more troubling. The purpose of the precondition is to show that a minority group has the potential to elect its own candidates. The absence of a majority vote requirement means that when more than two candidates are running for the same seat, a minority group may be able to elect its candidate of choice without a majority of the vote. The obvious example, assuming racially polarized voting, is the situation of one minority candidate running against several white candidates. Because the white majority's votes are split, the minority candidate may be elected even though his total opposition garnered more votes.

In arguing that the *Gingles* population requirement should not apply here, appellants request that we take

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[10] Several other circuits have reached the same conclusion. *See Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1550 (11th Cir. 1987), *cert. denied sub nom. Duncan v. Carrollton*, 108 S. Ct. 1111 (1988); *Collins v. City of Norfolk*, 816 F.2d 932, 936 (4th Cir. 1987); *Buckanaga v. Sisseton Indep. School Dist., No. 54-5*, 804 F.2d 469, 472 (8th Cir. 1986).

a "functional view" of the way politics actually works in Springfield. According to their expert, many of the elections in the area field more than two candidates. Actually, appellants simply offer proof that in "over half of the seventeen Springfield area elections . . . the number of candidates was more than twice as high as the number of seats available." Brief of Appellants at 32. This argument, however, is beset with problems. To begin with, the evidence does not focus on elections for the park district and school board; it primarily concerns other elections in the area. Also, the evidence, even if probative, does not guarantee that future park district and school board elections will feature more than two candidates for a single seat. Further, when three or more candidates run for a single seat, it is quite possible that more than one candidate will be preferred by minority voters. Modifying our earlier hypothetical slightly, the minority vote may splinter when two blacks and one white vie for the same seat.

Movement away from the *Gingles* standard invites courts to build castles in the air, based on quite speculative foundations. In our view, the Court based its bright-line requirement on a plausible scenario under which courts can estimate approximately the ability of minorities in a single-member district to elect candidates of their choice. Other scenarios are, of course, possible, but that possibility alone is not a good reason to destroy the interests in clarity and uniformity furthered by a bright-line test. No one has presented a statistical probability distribution of the variations from the *Gingles* model in Springfield Park District or School District elections but variations favoring minorities might well be offset by variations favoring whites.

To prove a section 2 violation, the potential to elect must be solid and substantial. It cannot be speculative. Blacks comprising less than a majority in a district would not necessarily have the requisite potential to elect

their candidates of choice. In the elections at issue here, even if all eligible black voters supported a single candidate in the proposed single-member district, that candidate would not be assured of electoral success. A sole challenger, supported by a bloc of white voters, would win.

As we have noted, there are many circumstances, including the existence of cross-over voting proclivities and various combinations of majority and minority candidates, that might strongly affect the electoral prospects of minority candidates. We believe, however, that the Supreme Court acted within the most obvious electoral context in promulgating the *Gingles* rule. We think the Court did not intend for the rule to be ignored or sharply modified in light of the somewhat different electoral conditions presented here. We therefore hold that the absence of a majority vote requirement here does not remove this case from the ambit of the *Gingles* requirements.

III.

Appellants next argue that they comprise a majority in a proposed single-member district. While blacks would comprise small total population majorities, with 50.4% in a single-member park district and 50.2% in a single-member school district, they would not comprise a majority of the voting age population in either single-member district.

Read literally, the *Gingles* population requirement could be construed to require that the minority group constitute a majority only of the total population in a proposed single-member district. Substantial evidence and common sense, however, dispute this construction. In explaining its requirement, the *Gingles* Court consistently refers to "minority voters," for only *voters* can demonstate the potential to elect candidates of their choice. *Gingles*, 106 S. Ct. at 2766-67 n.17. The Court also

quotes the commentators who first proposed the requirement:

> [To] demonstrate [that minority voters are injured by at-large elections], the minority voters must be sufficiently concentrated and politically cohesive that a putative districting plan would result in districts in which members of a racial minority would constitute *a majority of the voters*, whose clear electoral choices are in fact defeated by at-large voting.

Id. at 2767 n.17 (emphasis added) (quoting Blacksher & Menefee, *From* Reynolds v. Sims *to* City of Mobile v. Bolden: *Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 Hastings L.J. 1, 55-56 (1982)). The threshold requirement roughly measures minority voters' potential to elect candidates of their choice. Because only minorities of voting age can affect this potential, it is logical to assume that the Court intended the majority requirement to mean a voting age majority. Viewed another way, those ineligible to vote have not experienced a dilution of their vote. They are not parties to a section 2 claim.

Moreover, courts interpreting *Gingles* have taken the threshold requirement to mean voting age majority. The district court in *Romero v. City of Pomona*, 665 F. Supp. 853, 854 (C.D. Cal. 1987), stated that "[o]nly those individuals eligible can be counted in determining whether a minority group can constitute a voting majority in a single-member district." *See also Martin v. Allain*, 658 F.Supp. 1183, 1204 (S.D. Miss. 1987). Even before *Gingles*, some courts required a showing that a minority group constituted a voting age majority in a single-member district. Thus, the district court in *Gingles*, 590 F. Supp. 345, stated in its supplemental opinion that "the vote dilution concept . . . involve[s] the impact of districting upon effective voting majorities," and that "no aggregation of less than 50% of an area's voting age

population can possibly constitute an effective voting majority." *Id.* at 381 & n.3. The court also doubted "whether the concept of racial vote dilution can . . . be applied . . . to . . . aggregations of black voters [smaller] than those sufficient to make up effective single-member district voting majorities." *Id.* at 380-81. Similarly, another district court held that Boston's districting plan did not impermissibly dilute hispanic voting strength because plaintiffs were unable to show that a district containing an hispanic voting majority could be created. *Latino Political Action Comm. v. City of Boston*, 609 F. Supp. 739 (D.C. Mass. 1985), *aff'd*, 784 F.2d 409 (1st Cir. 1986). Finally, in *Ketchum v. Byrne*, 740 F.2d 1398, 1412-13 (7th Cir. 1984), we noted that voting age population at the very least (and as augmented to reflect other factors) is an appropriate measure of potential voting strength. Plaintiffs here simply failed to meet their burden of showing such strength.

IV.

Appellants next maintain that their proposed single-member district contains a black voting age majority because of population growth since the 1980 census, which indicated a minority voting age population of roughly 43%. Appellants rely on their expert's demographic analysis estimating a minority population of 56% in the proposed district as of 1987. They support the use of these estimates through reference to dicta in *Gaffney v. Cummings*, 412 U.S. 735 (1973). The *Gaffney* Court stated the following:

> [I]t must be recognized that total population, even if absolutely accurate as to each district when counted, is nevertheless not a talismanic measure of the weight of a person's vote under a later-adopted reapportionment plan. The United States census is more of an event than a process. It measures population at only a single instant in time. District popu-

> lations are constantly changing, often at different rates in either direction, up or down. Substantial differentials in population growth rates are striking and well-known phenomena.

Id. at 746. Here the plaintiffs put their finger on a problem that applies not only to voting rights litigation but also to the fairness of presidential elections by the electoral college, districting of the House of Representatives and other political apportionment situations. With a mobile population, the demographic facts may always be a bit stale.

Nonetheless, we think there are two problems with the plaintiffs' argument. First, they never raised it in the court below. Although the plaintiffs filed an affidavit containing projections of population figures based upon past trends, they never argued the point raised here in responding to the summary judgment motion. "It is a well-settled rule that a party opposing summary judgment must inform the trial judge of the reasons, legal or factual, why summary judgment should not be entered. If it does not do so, and loses the motion, it cannot raise such isues on appeal." *Liberales v. County of Cook*, 709 F.2d 1122, 1126 (7th Cir. 1983). Therefore, we must consider this issue to have been waived.

Were we not to find waiver, plaintiffs would still face a tough battle. Whatever the practical merits, they base their argument on a slender legal reed: the *Gaffney* language quoted above. But that language really does not help them. It simply suggests that census data may not accurately reflect present population; it does not require courts to use a different talisman. The census is presumed accurate until proven otherwise. *Latino Political Action Comm.*, 568 F. Supp. at 1018. Proof of changed figures must be clear and convincing to override the presumption. *Dixon v. Hassler*, 412 F. Supp. 1036, 1040 (W.D. Tenn.) (three judge panel), *aff'd sub nom. Republican Party v. Dixon*, 429 U.S. 934 (1976).

Plaintiffs fail to provide any concrete evidence to rebut the presumption. In the present state of the demographic art, estimates based on past trends are generally not sufficient to override "hard" decennial census data. As the Supreme Court pointed out in *Gaffney*, 412 U.S. at 746, populations change constantly and kinks in the data are common. Perhaps in the future, there will be some shift in the decennial approach to the facts of population. But the meager evidence before us cannot override the presumption of census accuracy. In any event, if the plaintiffs' view of the population trends is correct, they will have a good claim based on the 1990 census.

V.

Appellants further argue that we should order the creation of additional seats to the park and school boards to enable black voters to satisfy the threshold requirement. Thus, instead of the seven seats mandated by state law, we would fashion eight or nine districts, one of which would be predominantly black. Although courts have broad remedial powers, plaintiffs must first show injustice. Here the purpose of the *Gingles* preconditions is to determine, as a preliminary matter, whether a multi-member district illegally dillutes minority voting strength. Since we have found that it does not, we cannot fashion a remedy. Adding seats to the boards would create a voting rights violation where none presently exists by enabling appellants to meet the necessary precondition of their section 2 claim. This is a sort of bootstrapping we cannot accept.

Appellants cite only one case that even remotely supports this argument. The Eleventh Circuit in *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987), *cert. denied sub nom. Duncan v. Carrollton*, 108 S. Ct. 1111 (1988), affirmed the power of the district court to increase the number of government officials in order to give minority voters an opportunity to elect can-

didates of their choice. But the facts of *Carrollton* clearly distinguish that case from this one. In *Carrollton*, the membership of the county commission was reduced in number from five to three and later to one as the black voting age population rose to 15.3%. There was evidence that the single-member county commission had been adopted in 1947 solely in order to diffuse black voting strength. *Id.* at 1551. In our view, these unique circumstances of *Carrollton* distinguish it from the present case.

Where courts have changed the size of an elected body, they have done so with extreme caution. *See Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 199 (1972) (reversing court-mandated alteration of State Senate; change might be permissible where "*necessary* to meet *constitutional* requirements") (emphasis added). Such action upsets principles of federalism and may disrupt the operation of the affected body. *See id.* at 200 ("Size is for the State to determine . . . ."). It is not reasonable to add seats to the park and school boards essentially to *create* a section 2 violation.

VI.

Appellants finally argue that, although the application of *Gingles* may warrant summary judgment on the claim that the multi-member districts impair their ability to *elect* their preferred candidates, they can prevail on a claim that the system impairs their ability to *influence* elections. Appellants rely on a distinction made briefly by the *Gingles* majority. *See* 106 S. Ct. at 2764 n.12. The *Gingles* Court indeed divided section 2 claims into two categories. In the first, plaintiffs with a sufficiently large and compact population to constitute a majority in a single-member district would be able to allege that the multi-member district impairs their ability to elect candidates of their choice. The Court added that it was not considering whether section 2 may permit claims brought by a minority group, not sufficiently large and compact

to constitute a majority in a single-member district, that the multi-member district impairs its ability to influence elections. *Id.*

This distinction seems inconsistent with the statute's language. Section 2 states that a voting rights violation is established "if it is shown that the political processes . . . are not equally open to participation by members . . . [of a minority group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). The essential inquiry is thus whether the political processes are equally open to participation by minority voters. It calls for only one claim.

We cannot accept the appellants' contention that they can avoid the *Gingles* criteria by arguing that the multi-member districts impair their ability to influence elections. Given the Court's decision to draw a bright line for summary judgment purposes, it seems counterproductive to permit plaintiffs who cannot satisfy the threshold *Gingles* tests to make alternative claims that would obliterate the bright line. If allowed, the "ability to influence" claim would severely undermine whatever good purpose is served by the threshold factors. *See Gingles*, 106 S. Ct. at 2787 n.1 (O'Connor, J., concurring in the judgment) (criticizing the distinction).

Courts might be flooded by the most marginal section 2 claims if plaintiffs had to show only that an electoral practice or procedure weakened their ability to influence elections. While Congress intended to make it easier for minorities to show that their vote has been diluted, it presumably did not intend to require courts to entertain claims by a tiny segment of a multi-member district's population that the group's inescapably minimal influence has been impaired by the electoral arrangements. In view of the Court's apparent objective of sharpening section

2's focus, we cannot consider claims that multi-member districts merely impair plaintiffs' ability to influence elections. Plaintiffs' ability to win elections must also be impaired.

VII.

We are trying to carry out the Supreme Court's mandate in *Thornburg v. Gingles*. Essentially the Court attempted to define a point at which an arguable voting rights deprivation becomes so marginal as to be unworthy of analysis under a "totality of the circumstances" approach. The appellants have attempted to point out imperfections in the Supreme Court's test as applied to the particular facts of this case. Concededly there are imperfections at the margins. But taken in context they are not so significant as to justify departure from the Court's threshold rule. The test cuts rough justice, a fact that becomes apparent in the contrast between plaintiffs' claim that the requirement is too strict and Justice O'Connor's claim that it is too lax. *See supra* pp. 9-10 n.7. We are, of course, bound by the Supreme Court's determination. Further, we think the rule works no injustice in the present circumstances. This is precisely the kind of case where the Court thought invocation of the Voting Rights Act would be inappropriate. Appellants cannot show that the at-large election system at issue here impairs their ability to elect candidates of their choice. We therefore affirm the district court.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

No. 87-3016 and No. 87-3017
Consolidated

FRANK MCNEIL, WILLIAM H. WASHINGTON, SR., RUDOLPH V. DAVENPORT, ARCHIE LAWRENCE, and HOWARD VEAL, SR.,
Plaintiffs,

v.

SPRINGFIELD PARK DISTRICT and the SPRINGFIELD ELECTION COMMISSION,
Defendants,

and

FRANK MCNEIL, WILLIAM H. WASHINGTON, SR., RUDOLPH V. DAVENPORT, ARCHIE LAWRENCE, and HOWARD VEAL, SR.,
Plaintiffs,

v.

SPRINGFIELD SCHOOL DISTRICT No. 186 and the SPRINGFIELD ELECTION COMMISSION,
Defendants.

OPINION ORDER

[Entered Aug. 13, 1987]

MILLS, District Judge:

Voting Rights Act violation?

No.

Summary judgment for the School District and the Park District.

These cases have been consolidated for purposes of ruling on Defendants' motions for summary judgment. Plaintiffs' complaints challenge the method of electing park board trustees and school board members under § 2 of the Voting Rights Act, 42 U.S.C. § 1973, asserting that the at-large election systems impair the ability of minority voters to elect representatives of their choice.

I—PROCEDURAL HISTORY

After the filing of the complaint in the park district suit, Plaintiffs moved for a preliminary injunction on March 9, 1987. On March 20, 1987, this Court held a hearing on the motion and denied the request to enjoin the upcoming elections. On April 2, 1987, we entered a written opinion fully setting out our reasons for denying injunctive relief. *McNeil v. Springfield Park District*, 656 F. Supp. 1200 (C.D. Ill. 1987).

Following the period of discovery, Defendants moved for summary judgment on June 17, 1987. Plaintiffs requested and were granted an extension of time in which to respond and filed their response on July 24, 1987. We have considered the extensive memoranda submitted by the parties along with the affidavits and other supporting materials of record. The motion is now ripe for our ruling.

The school district suit has followed approximately the same time table with the exception of the timing of the preliminary injunction motion. Plaintiffs' motion for a preliminary injunction was filed on May 19, 1987. The motion is still pending; however, our decision on the summary judgment motion moots the question of whether Plaintiffs are entitled to preliminary relief.

II—FACTS

A. *School District*

1. Present Election System

Defendant Board of Education is a seven-member body established under the School Code of the State of Illinois, Ill. Rev. Stat. ch. 122, to manage and govern the schools within District 186. Positions on the board of education are unpaid. Ill. Rev. Stat. ch. 122, ¶ 10-10 22-1 (1985).

Elections to the board are at-large and non-partisan. Ill. Rev. Stat. ch. 46, ¶ 2a-1.2(e)(1), and ch. 122, ¶¶ 10-3, 10-4 and 10-10 (1985). There are no limits to how many candidates may appear on the ballot; any adult citizen of the district who files a timely nomination petition with 50 signatures may appear on the ballot. Ill. Rev. Stat. ch. 122, ¶ 9-10 (1985). There are no primaries or majority vote requirements for elections to the school board. Ill. Rev. Stat. ch. 46, ¶ 2a-1.2(e)(1), and ch. 122, ¶¶ 10-3, 10-4, and 10-10 (1985).

Prior to 1981, members of the board served staggered 3-year terms. Ill. Rev. Stat. ch. 122, ¶¶ 10-4, 10-10 (1979). Elections were held each year in April for two or three open seats. *Id.* Because of a change in state law in 1981, board members are now elected to 4-year terms and elections are held in November of every odd-numbered year. The year 1983 was a transitional one. Ill. Rev. Stat. ch. 122, ¶¶ 10-4 and 10-10. That election involved two 2-year terms and three 4-year terms.

2. Population Data

According to the 1980 United States Census, the population of District 186 is 122,997, of which 110,485 are white (89.82%), 11,217 are black (9.1%), and 1,295 (1%) are members of other races.

Because 95.7% of all blacks who live in District 186 reside within the city of Springfield, if District 186 were to be divided into 7 single-member districts, any majority black district which might be drawn must be, for all practical purposes, within the city. The 1980 census shows that the total population of the city is 99,637, of which 87,719 are white (88%), 10,735 are black (10.77%), and 1,165 (1.17%) are members of other races. The voting age population of the city is 74,257, of which 67,178 are white (90.46%), 6,345 are black (8.54%), and 734 are members of other races (.98%).

3. The Proposed District

Generally accepted standards for redistricting require that districts should be drawn which are compact and geographically contiguous and equal in population. It is generally recognized that, where equal population districts are not drawn, any variance should be based on rational policy, such as following neighborhood lines or precinct boundaries.

With this standard in mind, the parties agree that the school district should be divided into seven districts. Accepting the facts and inferences most favorable to Plaintiffs, a single member district could be drawn which would contain a 50.2%-50.4% black majority. However, again drawing the inferences most favorable to Plaintiffs, a district cannot be drawn where blacks constitute a voting age majority. Defendants' evidence places the percentage of voting age blacks in this district at 43.2%. Plaintiffs do not refute this evidence in any of their affidavits or other submissions in the record.

B. *Park District*

The facts are virtually the same in the park district suit. The only major point of departure is an initial disagreement as to whether the park district should be di-

vided into six or seven single-member districts. Because of our ultimate disposition, we need not decide that question here. Therefore, we will assume that Plaintiffs are correct in stating that the park district should be divided into seven single member districts.

Using the seven districts as the standard, the numbers shake out roughly the same way as the school district. Blacks can maintain a 50.2% majority in a single district. Blacks cannot comprise a majority in a single district when voting age population figures are used. Defendants' figures indicate that blacks would constitute 43.7% of the proposed district when voting age population figures are used.

Plaintiffs have not refuted this evidence.

III—SUMMARY JUDGMENT STANDARD

Under Rule 56(c), summary judgment should enter "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no *genuine* issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Unquestionably, in determining whether a genuine issue of material fact exists, the evidence is to be taken in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). Nevertheless, the rule is also well established that the mere existence of *some* factual dispute will not frustrate an otherwise proper summary judgment. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986). Thus, the "preliminary question for the judge [is] not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed." *Id.* at 2511, *quoting Improvement Co. v. Munson*, 14 Wall. 442, 448 (1872); *see also Celotex*

Corp. v. Catrett, 106 S.Ct. 2548, 2553 (1986). In other words, the Court must consider the evidence "through the prism of the substantive evidentiary burden" in deciding Defendants' motion. *Anderson*, 106 S.Ct. at 2513; *Carson v. Allied News Co.*, 529 F.2d 206, 210 (7th Cir. 1976). Applying this standard, the Court now turns to the case at bar.

IV—LAW AND ANALYSIS

A.

Plaintiffs first argue that the use of summary procedures by the Court is inappropriate in the context of the complex issues raised by this voting rights litigation. For that proposition they cite *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S. Ct. 486, 491, 7 L. Ed. 2d 458 (1962), where the Supreme Court observed that "[s]ummary procedures should be used sparingly in complex anti-trust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."

Poller is correct as far as it goes; however, it has never gone so far as to create a "complexity" exception to Federal Rules 12(b)(6) and 56. *See, e.g., Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984); *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 553 (7th Cir. 1980).

The typecast of the issues raised do not necessarily determine whether summary judgment is required. As is true in any other case before us on a motion for summary judgment, the propriety of granting the motion is dependent on the interplay of the facts and law presented and the application of those facts and law to the standard enunciated in Rule 56. To treat any given case otherwise would "represent an abdication of our judicial responsibility." *Havoco*, 626 F.2d at 553.

In any event, motive and intent do not play a role in this case. The Voting Rights Act created a strictly results-based test and this case may properly be decided upon the undisputed facts before us.

B.

Although the parties have argued additional issues, the Court believes that this motion presents a single question: Can Plaintiffs bear the burden of proving that the minority group is "sufficiently large and geographically compact to constitute a majority in a single member district"? *Thornburg v. Gingles*, 106 S. Ct. 2752, 2766, 92 L. Ed. 2d 25 (1986).

The Supreme Court spoke of the above-stated quotation as one of three necessary preconditions to establishing a violation of § 2 of the Voting Rights Act. *Id.* Thus, if a class of plaintiffs fails on the proof of this condition, the defendant must prevail.

Here, Plaintiffs argue that the affidavits of their expert, Dr. Race Davies, establishes that blacks constitute a 50.2% majority in a single member district. They argue that this enables them to clear the first hurdle of *Thornburg*. We agree, as we must, on the motion for summary judgment, with Plaintiffs' evidence establishing that a single member district can be drawn containing a 50.2% black majority. This does not, however, lead us to Plaintiffs' ultimate conclusion that the first element of the *Thornburg* criteria has been met.

The reason for our disagreement is our belief that Plaintiffs have proceeded on a faulty legal premise. Plaintiffs' premise is that *Thornburg* only requires plaintiff class to demonstrate that it can constitute a bare majority in a single member district. Plaintiffs maintain that *Thornburg* should be read as requiring a simple majority based on the total population of the district. Defendants counter by arguing that the population figures

should be derived from the total voting age population as opposed to the total population. We agree with Defendants that "majority" as it is used in *Thornburg* refers to the voting age population rather than the total population.

Defendants' position is supported by three arguments. First, language in *Thornburg* itself indicates that the Court was referring to a voting age majority. Second, the district court opinion which spawned the *Thornburg* case supports the use of a voting age majority, as does additional case law. And three, a logical interpretation of the Voting Rights Act compels the use of a voting age majority to determine whether minority voters are injured as a result of the challenged voting structure.

As we noted earlier, *Thornburg* held that in order to maintain a successful challenge to an existing form of government under the Voting Rights Act a minority group must show that "it is sufficiently large and geographically compact to constitute a majority in a single member district." *Thornburg*, 106 S. Ct. at 2766. Read literally and without further elucidation, this could be construed as requiring only a population majority. Plaintiffs asks us to interpret the language in this manner. However, the Supreme Court's explanation for this threshold test calls for a different interpretation. The Supreme Court explained:

> The reason that a minority group making such a challenge must show, as a threshold matter, that is sufficiently large and geographically compact to constitute a majority in a single member district is this: unless *minority voters possess the potential to elect representatives* in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice. The single-member district is generally the appropriate standard against which to measure *minority group potential to elect* because it is the smallest political unit

> from which its representatives are elected. Thus, if the minority group is spread evenly throughout a multi-member district, or if, although geographically compact, the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, *these minority voters* cannot maintain that they would have been able to elect representatives of their choice in the absence of the multi-member electoral structure. As two commentators have explained, "to demonstrate [that *minority voters* are injured by at-large elections], the *minority voters* must be sufficiently concentrated and politically cohesive that a putative districting plan would result in districts in which members of a racial minority would constitute a majority of the voters, whose clear electoral choices are in fact defeated by at-large voting. If *minority voters*' residences are substantially integrated throughout the jurisdiction, the at-large district cannot be blamed for the defeat of the minority-supported candidates. . . . [This standard] thus would only protect racial *minority voters* from dimunition proximately caused by the districting plan; it would not assure racial minorities' proportional representation." (Emphasis ours.)

Thornburg, 106 S. Ct. at 2766-67, n.17 (*citing* Blacksher & Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 Hastings L.J. 55-56 (1982)).

What is readily apparent from the Court's reasoning is that the threshold test focuses on minority voters' potential to elect representatives of their choice. Only those members of the minority who are eligible to vote can affect this potential to elect. It is not surprising that the Court's language frequently refers to minority voters. Hence, we believe that the Court was implicitly adopting the minority voting age population as its point

of reference. We are confident that if directly confronted with the question, the Supreme Court would acknowledge that the voting age population is the relevant figure to be used in determining if the Plaintiffs can meet the first element of *Thornburg*.

Furthermore, we do not have to look far to find an explicit adoption of voting age population as the appropriate measuring stick. In *Gingles v. Edmenstein*, the district court found that "no aggregation of less than 50% of an area's voting age population can possibly constitute an effective voting majority." 590 F. Supp. 345, 381 n.3 (E.D. N.C. 1984), *aff'd in part, rev'd in part*, sub nom, *Thornburg v. Gingles*, 106 S. Ct. 2756 (1986). The district court created a low side limit which a voting rights plainitff must overcome in order to prevail. *Id.* At this point, it is strictly a numbers game and no other factors need be examined. This of course comports with the "results" oriented approached which Congress sought to implement in the Voting Rights Act. *Thornburg*, 106 S. Ct. at 2759.

The Supreme Court did not disturb this portion of the district court's opinion and we believe implicitly adopted it. Other courts are in agreement with this conclusion. *See, e.g., Latino Political Action Committee v. City of Boston*, 609 F. Supp. 739, 747 (D. Mass. 1985), *aff'd*, 784 F.2d 409 (1st Cir. 1986); *Martin v. Allain*, Slip op. J.84-0708(b) (S.D. Miss. Apr. 1, 1987).

Finally, common sense dictates that we use the voting age population as our point of reference. When speaking of vote dilution or potential to elect representatives, you necessarily speak of voters. Those not eligible to vote do not enter into the calculation. Hence, a test which incorporates non-voters improperly skews the balance against defendants. For these reasons we find that the minority voting age population is the determining factor for purposes of deciding whether Plaintiffs meet the first pre-condition of *Thornburg*. We now turn to

the question of whether summary judgment is appropriate when utilizing the minority voting age population as the appropriate standard.

C.

Plaitiffs have brought no evidence showing that blacks would constitute a majority of the voting age population in their proposed district. Both the park district and school district have submitted affidavits that place the voting age population in Plaintiffs' proposed district below 50%. The park district's affidavits show a black voting age population of 43.7% in the proposed district. The school district's affidavits reach a result of 43.2%. At trial, Plaintiffs would bear the burden of proving that the black voting age population would be 50% or greater in their proposed district.

The burden of the moving party is to show that there is no genuine issue of material fact. The moving party may support its motion with affidavits and similar material. Fed. R. Civ. P. 56(e). If through its supporting materials the moving party has demonstrated the absence of a genuine issue of material fact, then under Rule 56(e) the burden shifts to the nonmoving party to show evidence of a genuine issue of material fact. The moving party cannot thereafter rely on its pleadings. Wright, Miller & Kane, Federal Practice & Procedure, Civil 2d, § 2739 (1983).

Here, Defendants' figures as to the voting age population have not been rebutted by any of Plaintiffs' affidavits or other supporting materials. Hence, Defendants have met their burden of showing the absence of a genuine issue of material fact.

And "the plain language of Rule 56(c) *mandates* the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an

element to that party's case and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2552-53 (1986).

Deefndants have met their burden of showing an absence of a genuine issue of material fact and Plaintiffs have failed to make a sufficient showing establishing the existence of a key element to their case on which they bear the burden of proof at trial. Therefore, summary judgment in favor of Defendants is mandated.

V. CONCLUSION

Ergo, the motions of summary judgment filed by Springfield School District No. 186 and by the Springfield Park District are ALLOWED. Judgment is entered in favor of the Defendants and against the Plaintiffs.

All other pending motions are denied as moot.

Case CLOSED.

ENTER: August 13, 1987.

FOR THE COURT:

/s/ Richard Mills
RICHARD MILLS
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

July 8, 1988

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*

HON. RICHARD D. CUDAHY, *Circuit Judge*

HON. DANIEL A. MANION, *Circuit Judge*

No. 87-2478

FRANK MCNEIL, *et al.*, individually and as representatives of a certified class,
Plaintiffs-Appellants,

vs.

SPRINGFIELD PARK DISTRICT and
SPRINGFIELD SCHOOL DISTRICT No. 186,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois, Springfield Division
No. 87 C 3016, 87 C 3017—RICHARD MILLS, *Judge*

JUDGMENT—ORAL ARGUMENT

This cause was heard on the record from the United States District Court for the Central District of Illinois, Springfield Division, and was argued by counsel.

On consideration, whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

September 21, 1988

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*

HON. RICHARD D. CUDAHY, *Circuit Judge*

HON. DANIEL A. MANION, *Circuit Judge*

No. 87-2478

FRANK MCNEIL, *et al.*, individually and as representatives of a certified class,
Plaintiffs-Appellants,

v.

SPRINGFIELD PARK DISTRICT and
SPRINGFIELD SCHOOL DISTRICT No. 186,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois, Springfield Division.
No. 87 C 3016, 87 C 3017—RICHARD MILLS, *Judge*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed by the plaintiffs-appellants in the above-entitled cause, no judge in regular active service requested a vote thereon and all of the members of the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *en banc* be, and is hereby, DENIED.

Honorable Harlington Wood, Jr., did not participate in the consideration of this petition for rehearing *en banc*.

SUPREME COURT, U.S.
FILED
MAR 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1378

In The

Supreme Court of the United States

October Term, 1988

FRANK McNEIL ET AL.,

Petitioners,

v.

SPRINGFIELD PARK DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

ROBERT C. WALBAUM*
1231 South Eighth Street
Springfield, IL 62073
Phone: (217) 789-0911

PAUL BOWN
BROWN, HAY & STEPHENS
700 First National Bank
Building, P.O. Box 2459
Springfield, IL 62705
Phone: (217) 544-8491

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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STATEMENT OF THE CASE

Respondent Springfield Park District was founded as The Pleasure Driveway and Park District of Springfield in 1900. Pursuant to the original statutory scheme, elections have been consistently at-large. *See,* Ill. Rev. Stat. Chapter 105, Para. 108 (1895). The elections have also been consistently non-partisan. *See,* Ill. Rev. Stat. Chapter 105, Para. 2-17 and 2-11.

Springfield Park District has a governing board consisting of a president, elected at large for a four year term, and six trustees, also elected at large for four-year terms. *See,* Ill. Rev. Stat. Chapter 105, Para. 2-15. Three of the six trustees run at large every other year as provided by the original statutory scheme and in accord with the consolidation of the various park district statutes in the Park District Code. *See,* Ill. Rev. Stat. Chapter 105, Para. 1-2(a). No provision is made in the Park District Code for any election of officers other than at large, and none of the various forms of governing bodies for park districts have a membership larger than seven. *See,* Ill. Rev. Stat. Chapter 105, Para. 1 *et seq.*

The 1980 census of the Springfield Park District showed a total population of 119,334 persons. Of those persons, 11,198 were identified as black. According to the census, 76.6 percent of the white population is of voting age, while 59.0 percent of the black population is of voting age. *See,* Affidavit of Susan Poludniak appearing in Appendix of Appellee in the Court of Appeals at Page 14.

Petitioners filed this matter as a class action in the United States District Court for the Central District of

Illinois on January 20, 1987. Plaintiffs alleged that the at-large election system of the Springfield Park District violated Section 2 of the Voting Rights Act of 1965, as amended in 1982, 42 U.S.C., Section 1973.

Petitioners proposed dividing the Springfield Park District into seven single-member districts. According to the 1980 census figures, the petitioner's putative district containing the largest concentration of minority population would be 50.4 percent black, but in that district, the minority would constitute only 43.7 percent of the voting-age population in the district. *McNeil v. Springfield Park* District, 851 F.2d 937, 939, n. 2 (7th Cir., 1988) Petitioners' Appendix (hereinafter App.) p. 2a n. 2.

Summary judgment was granted in favor of the Respondent and Springfield School District No. 186[1] on August 13, 1987. The trial court held that Petitioners failed to bear the burden of proving that the minority group was sufficiently large and geographically compact to constitute a majority in a single-member district. *McNeil v. Springfield Park District*, 666 F. Supp. 1208 (C.D. Ill. 1987), App. p. 22a.

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[1]Springfield School District No. 186 was named as a defendant in a separate suit in the trial court, Cause No. 87-3017. The School District case and that against Respondent were consolidated by the trial court for opinion and were consolidated for hearing and opinion on appeal. Following the decision on appeal, the manner of election of the Springfield School District was changed by referendum from at large to by district. Based on that change, Petitioners filed a motion to withdraw the mandate as to the School District in the Court of Appeals asserting the matter was moot. The motion to withdraw the mandate was denied on February 13, 1989.

The Court of Appeals for the Seventh Circuit affirmed. *McNeil v. Springfield Park District,* 851 F.2d 937 (7th Cir., 1988) App. p. 1a. A Petition For Rehearing and A Suggestion For Rehearing en banc was denied by the Seventh Circuit on September 21, 1988. App. p. 36a.

REASONS FOR DENYING THE WRIT

Since *Thornburg v. Gingles* 478 U.S. 30 (1986), the court below as well as five other circuits and numerous district courts have construed *Gingles.* The interpretation of *Gingles* has been consistent and uniform. There is no need to revisit this Court's decision in *Gingles.*

The decision below stands for two simple propositions: First, that interpreting the first of three "preconditions" for actions brought under Section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. Section 1973, as set forth in *Gingles,* the word "majority" means majority of voting-age population; and second, that where the *Gingles* preconditions cannot be met, summary judgment, under Federal Rule of Civil Procedure 56 is appropriate.

Petitioners conceal a myriad of issues in the single question presented to this court. While some of those issues have been squarely presented below, others have received almost no attention from the Petitioners in their evidence and legal memoranda and consequently, from both the trial and appellate court below.

Respondent, Springfield Park District, will argue (1) that the decisions below are entirely consistent with this

court's decision in *Thornburg v. Gingles*, (2) that the decision below is consistent with voting rights cases both pre- and post-*Gingles* and that there exists in the reported cases, no conflict in the interpretation of *Gingles*, (3) that summary judgment is appropriate when the *Gingles* thresholds cannot be met, and (4) that the decision below affects only marginal cases where no effective remedy is available.

I. "MAJORITY" MEANS VOTING-AGE MAJORITY IN THE CONTEXT OF THE FIRST OF THE GINGLES THREE PRECONDITIONS.

In January of 1987, a class action was brought against the Respondent, Springfield Park District, alleging essentially that the Park District's statutory election scheme which provided for the election of a president and six trustees in at-large elections, violated the Plaintiffs' rights under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. Section 1973. The suit alleged that the at-large structure diluted the voting power of the minority citizens of the Springfield Park District in that at-large elections gave minority members less opportunity than other members of the electorate to elect representatives of their choice.

Section 2 of the Voting Rights Act was amended in 1982[2] as a response to this court's decision in *City of*

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[2]Section 2 of the Voting Rights Act of 1965, 42 U.S.C. Section 1973 as amended in 1982 reads as follows:

(Continued on following page)

Mobile v. Bolden, 446 U.S. 55 (1980). *Bolden* broke with prior precedent by requiring Plaintiffs to prove discriminatory purpose as a necessary element of their claim.

This court first spoke to the amended Section 2 in 1986 in the matter of *Thornburg v. Gingles*, 478 U.S. 30 (1986). Justice Brennan, writing for the court, examined the legislative history of Section 2 and found that at-large elections are not *per se* violative of Section 2. *Id.* at 46-47.[3]

The court in *Gingles* established three necessary preconditions which must be shown before a multi-member district can be said to impair the ability of minority voters

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(Continued from previous page)

(a) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

[3]Likewise, at-large methods of electing legislative bodies are not unconstitutional per se. *Rogers v. Lodge*, 458 U.S. 613 (1982).

to elect representatives of their choice. *Id.* at 50-51. This matter concerns only the first of the necessary preconditions.

In addressing to the first of the preconditions, the court said:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district [footnote omitted]. If it is not, as would be the case in the substantially integrated district, the *Multimember form* of the district cannot be responsible for the minority voters' inability to elect its candidates. *Id.* at 50.

The court explained its rationale in Footnote 17:

> The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice. The single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected. Thus, if the minority group is spread evenly throughout a multi-member district, or if, although geographically compact, the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, these minority voters cannot maintain that they would have been able to elect respresentatives of their choice in the absence of the multi-member electoral structure. As two-commentators have explained:

> "To demonstrate [that minority voters are injured by at-large elections], the minority voters must be sufficiently concentrated and politically cohesive that a putative districting plan would result in districts in which the members of the racial minority would constitute a majority of the voters whose clear electoral choices are in fact defeated by at-large voting. If minority voters' residences are substantially integrated throughout the jurisdiction, the at-large district cannot be blamed for the defeat of minority-supported candidates . . . [This standard] thus would only protect racial minority votes for diminution proximately caused by the districting plan; *it would not assure racial minorities proportional representation.* [Citations omitted.] *Id.* at 50, n. 17.

The language of the footnote makes clear that Justice Brennan was discussing only those members of the minority group eligible to vote[4] and that the preconditions are tests of causation. Only a majority of those eligible to vote can establish the potential to elect. In absence of the potential to elect, as shown through the concentration of minority voters, the multi-member form of government cannot be said to be the proximate cause of any electoral failure.

Throughout Footnote 17, the *Gingles* court consistently refers to "minority voters." Such a distinction is clearly warranted under prior voting rights interpretations

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[4]As the Court below pointed out, " . . . those ineligible to vote have not experienced a dilution of their vote. They are not parties to a Section 2 claim." 851 F.2d at 945, App. p.15a.

and is consistent with the decisions both of the Supreme Court[5] and prior lower courts[6].

As the test is one of causation, it seems only logical that "majority" as used by Justice Brennan, is equated with voting age majority. The barest of population majorities as shown by Petitioners here is insufficient to show the potential to elect.

II. THE DECISION BELOW IS CONSISTENT WITH BOTH PRE- AND POST- GINGLES DECISIONS.

Prior to this court's decision in *Gingles,* a number of other courts considered the requirement for a voting-age majority in various contexts. The trial court in *Gingles* had stated the requirement for a voting-age majority simply:

> No aggregation of less than 50 percent of an area's voting-age population can possibly constitute an effective voting majority. *Gingles v. Edminstein,* 590 F. Supp. 345, 381 (E.D.N.C., 1984) *aff'd* in part, reversed in part *sub. nom. Thornburg v. Gingles, supra.*

Similarly, in *Latino Political Action Committee v. City of Boston,* 609 F .Supp. 739 (DC Mass, 1985) *aff'd* 784 F.2d 409 (1st Cir., 1986) the court stated:

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[5]"Voting age population data are probative because they indicate the electoral potential of the minority community. *City of Rome v. United States,* 446 U.S. 156, 186 n. 22 (1980).

[6]*See, Latino Political Action Committee v. City of Boston,* 609 F. Supp. 739 (DC Mass., 1985) *aff'd,* 784 F.2d 409 (1st Cir. 1986) and *Ketchum v. Byrne,* 740 F.2d 1398, 1412-13 (7th Cir. 1984) *cert. den.* 471 U.S. 1135 (1985).

> Because no district containing a . . . voting majority can be created . . . the district plan does not impermissibly dilute . . . voting strength. *Latino* at 747.

Judge Cudahy, who wrote the Appellate decision below, had previously addressed the issue in *Ketchum v. Byrne,* 740 F.2d. 1398, 1412-13 (7th Cir., 1984) *cert. denied,* 471 U.S. 1135 (1985). The *Ketchum* Court held that the minority population in a redistricting case, should be 65 percent of the total population in a district in order for the minority group to have an opportunity to elect candidates of its choice. Judge Cudahy explained his rational as follows:

> A guideline of 65 percent of total population has been adopted and maintained for years by the Department of Justice and by reapportionment experts and has been specifically approved by the Supreme Court in circumstances comparable to those before us as *representing the proportion of minority population reasonably required to ensure minorities a fair opportunity to elect a candidate of their choice.* This figure is derived by augmenting a simple majority with an additional 5 percent for young population, 5 percent for low voter registration and 5 percent for low voter turnout, for a total increment of 15 percent. This leads to a total target figure of 65 percent of total population. Obviously, if voting age population statistics are used, 5 percent would drop out of the formula leaving something in the vicinity of 60 percent of voting age population as the target population. (Emphasis added) *Id.* at 1415.

Subsequent to this court's decision in *Gingles,* six circuits, including the case now before the court, have interpreted *Gingles.* Each of these circuits has found the *Gingles* thresholds to be a prerequisite to the successful

prosecution of a claim under Section 2. *See, McGhee v. Granville County, North Carolina,* (in dicta) 860 F.2d 110, 117, 119 (4th Cir., 1988); *Collins v. City of Norfolk,* 816 F.2d 932, 935 (4th Cir., 1987); *Campos v. City of Baytown,* 840 F.2d 1240, 1244 (5th Cir., 1988) cert. pending #88-606, 57 L.W. 3296; *Buckanaga v. Sisseton Independent School District No. 54-5,* 804 F.2d 469, 473 (8th Cir., 1986); *Gomez v. City of Watsonville,* 863 F.2d 1407, 1413-14 (9th Cir., 1988); *Carrollton Branch of NAACP v. Stallings,* 829 F.2d 154f (11th Cir., 1987) *cert. denied sub. nom.; Duncan v. City of Carollton,* — U.S. —, 108 S.Ct. 1111, 99 L.Ed. 272 (1988); and *Solomon v. Liberty County,* Nos. 87-33406 and 87-3406a, Slip Opinion Pages 6 & 7 appearing at 1988 U.S. App. Lexis 16,777 (11th Cir., 1988).

Likewise, the District Court opinions post-*Gingles* have consistently held that the *Gingles* thresholds are a prerequisite to a successful prosecution under Section 2. *See, Romero v. City of Pomona,* 665 F. Supp. 853 (C.D. Cal., 1987); *Martin v. Allain,* 658 F. Supp. 1183, 1204 (S.D. Miss., 1987); *McDaniels v. Mehfoud,* No. 88-0020-R, Slip Opinion at 9, E.D. Va., 1988), available 1988 U.S. Dist. Lexis 15,114; *Armour v. State of Ohio,* No. C88-1104Y, Slip Opinion at 5-7 (N.D. Ohio, 1988); *Brewer v. Ham,* No. W-87-Ca-015, Slip Opinion at 6-7 (W.D. Texas, 1988); and *Clark v. The Holbrook Unified School District No. 3 of Navajo County,* Civ. No. 88-0148-DCT-RGS (D.C. AZ, 1989); available 1989 U.S. Dist. Lexis 442; and *Williams v. State Board of Elections,* 696 F. Supp. 1563, 1566 (N.D. Ill., 1988).

The courts are uniform in their application of the *Gingles* test with regard to the question of the meaning of

majority. "Although the language of *Gingles* seems to refer simply to gross minority population, references in the opinion to 'minority voters' show that the court intended the sufficiency of the single-district majority to be measured by the size of the voting age population." *Solomon, supra,* at 10.

Solomon rejected the Defendant's contention that majority had to be defined by the percentage of registered voters in the population. *Id.* at 19-20. Likewise, the trial court in *McDaniel v. Mehfoud, supra,* rejected a defense contention that the *Gingles* test must be met by a showing of a majority of those who turn out to vote, rather than a voting-age population measurement, *McDaniels supra* at 11-12. Similarly, the District Court in *Brewer v. Ham, supra* at 6, found following trial that the failure of plaintiffs to provide voting-age population data as opposed to total population figures was fatal to their claim citing *Wyche v. Madison Parish Police Jury,* 635 F.2d 1151, 1162 (5th Cir., 1981) for the proposition that total population figures rather than voting-age population figures are of no particular relevance in a vote dilution case. *See also, Romero v. City of Pomona, supra* at 864.

A review of the cases both prior to and following *Gingles* establishes that the *Gingles* thresholds are uniformly interpreted as prerequisites to maintenance of a Section 2 cause of action and that majority is determined by measuring voting-age population. No contrary authority appears in the authorities cited by Petitioners.

III. SUMMARY JUDGMENT IS APPROPRIATE WHEN THE GINGLES PRECONDITIONS CANNOT BE MET.

As with any matter, summary judgment is appropriate under Federal Rule of Civil Procedure 56(c) when:

> . . . the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is not genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine issue for trial. *First National Bank of Arizona v. City Service Company*, 391 U.S. 253 (1968).

This court's decision in *Gingles* made summary judgment entirely appropriate in voting rights cases. *Gingles* fashions a clear regime for a prima facie Section 2 case. Only upon satisfaction of the threshold criteria is a totality of the circumstances analysis necessary.[7]

Other circuits have also held that summary judgment is proper in Section 2 cases. *See, Carrollton Branch of NAACP v. Stallings, supra* at 1550; *Collins v. City of Nor-*

---

[7]See, *McNeil v. Springfield Park District* at 942, App. at 9a, and *Clark v. The Holbrook Unified School District, supra,* Slip Opinion at 4.

folk, 816 F.2d 932-936 (4th Cir., 1987); and *Buckanaga v. Sisseton Independent School District No. 54-5, supra* at 472.

Petitioners, argued in both the District and Circuit Courts that summary judgment is inappropriate in any Section 2 case. They now admit in Footnote 7 of their Petition that summary judgment would be appropriate in some cases.

Throughout the litigation below, Petitioners asserted that their facts met the *Gingles* criteria. Only now do Petitioners present this matter as one addressing a question left open by the *Gingles* court. Petitioners' argument is now tied specifically to the *Gingles* Footnote 12. That footnote reads as follows:

> We have no occasion to consider whether Section 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, which is not sufficiently large and geographically compact to constitute a majority in a single-member district, alleging that the use of a multi-member district impairs its ability to *influence* elections.
>
> We note also that we have no occasion to consider whether the standards we apply to Respondents' claim that multimember districts operate to dilute the vote of geographically cohesive minority groups that are large enough to constitute majorities in single-member districts and that are contained within the boundaries of the challenged multimember districts, are fully pertinent to other sorts of vote-dilution claims, such as a claim alleging that the splitting of a large and geographically cohesive minority between two or more multimember or single-member districts resulted in the dilution of the minority vote. 478 U.S. 30, 46-47, n. 12 (emphasis in original).

Essentially, Petitioners now ask this court to consider whether and under what circumstances a Section 2 challenge to at-large elections can be maintained by minority voters who would comprise less than a majority in a single-member district. Petitioners seek to have this court define, on this record, a new theory of liability based on an impairment of the Petitioners' ability to influence elections, as opposed the ability to elect.

Petitioners cite no authority standing for the proposition that the ability to influence is a relevant consideration on the question of liability. On the other hand, at least two cases have directly rejected the "influence" argument as a theory of liability. *See, Martin v. Allain, supra* at 1204 and *Armour v. State of Ohio, supra* at 4.

Like the single case cited in their Petition, *East Jefferson Coalition For Leadership and Development v. Parish of Jefferson*, 691 F. Supp. 991 (E.D. LA. 1988), all the cases dealing with "influence" in any way, are cases dealing with either the adequacy of a particular remedy after liability has been established, or redistricting cases. These are cases dealing with the packing or fracturing of minority groups by the drawing of district lines. *See*, e.g., *Major v. Treen*, 574 F.2d 325, 353 (E.D.La., 1983) (three judge panel) and *Seastrunk v. Burns*, 772 F.2d 143, 153-156 (5th Cir., 1985).

The court below did not believe that Footnote 12 left anything open:

> Given the Court's decision to draw a bright line for summary judgment purposes, it seems counterproductive to permit plaintiffs who cannot satisfy the threshold *Gingles* tests to make alternative claims

> that would obliterate the bright line. If allowed, the "ability to influence" claim would severely undermine whatever good purpose is served by the threshold factors. *McNeil v. Springfield Park Board, supra* at 947, App. at 20a, citing *Gingles, supra* at 90 n. 1 (O'Connor, J.) (concurring in judgment)

Judge Batchelder in *Armour v. Ohio, supra,* likewise does not believe that Footnote 12 leaves anything open. After discussing Footnote 12, Judge Batchelder held:

> Certainly the raising of a question of the full pertinence of the explicitly stated standards to a different kind of claim cannot be equated to an explicit "leaving open" of the entire question of what standards would be applicable to such a claim . . . *Armour, supra,* Slip Opinion at 4.

Petitioners in their Amended Complaint asserted that the form of the Springfield Park District impaired the ability of minority voters to "elect or to influence the election of representatives" of their choice. *See,* Appendix of Appellant in the Court of Appeals at 7. But the record was such that the trial court did not feel required to even to address the issue. *See, McNeil v. Park Board,* 666 F. Supp. 1208 (C.D. Ill., 1987) App. 22a *et seq.*

The Court of Appeals dealt with the "influence" issue in four paragraphs appearing following VI of its Opinion. App. pp. 19a-21a. Fairly read, the Appellate Court's opinion stands for the proposition that the mere allegation of the ability to influence is insufficient to avoid summary judgment.

The record in this case is inadequate for the court to address any influence issue. The efforts of the Petition-

ers throughout have been to bring the facts and circumstances of their case within the *Gingles* preconditions. The primary focus of the decisions of the District and Circuit Courts below was to interpret the first of the three *Gingles* preconditions.

Petitioners seek to blur the distinction between a claim based on the minority's ability to "influence" elections and a claim based on the minority's ability to "elect" candidates of its choice[8]. If, contrary to all the cited authority, an influence claim exists, it is a separate and distinct claim. Based on this record, there is no influence claim that is ripe for decision.

IV. THE DECISION BELOW AFFECTS ONLY MARGINAL CASES WHERE NO EFFECTIVE REMEDY IS AVAILABLE.

The court below found the *Gingles* test to be a reasonable exercise of the Court's authority over statutory interpretation. The *Gingles* approach focuses up front on whether there is an effective remedy for the claimed injury. It appropriately closes the courthouse to marginal cases. *See*, McNeil, at 942, App. p. 10a. An examination of the cases subsequent to *Gingles* bears that out.

Of the cases applying the *Gingles* test, plaintiffs have often prevailed. *See*, for example, *Gomez v. City of Watsonville, supra; Carrollton Branch of the NAACP v. Stallings, supra; Solomon v. Liberty County Florida, supra; McDaniel v. Mehfoud, supra.* Only when no effective remedy is available has *Gingles* been used to preclude voting

---

[8]*See, Petition for Writ of Certiorari* at 5 a, n. 4.

rights cases. *See, e.g. Martin v. Allain,* 658 F. Supp. 1183 (S.D. Miss., 1987) and *Armour v. State of Ohio, supra,* at 8.

Even prior to *Gingles,* the problems of applying Section 2 concepts to aggregations of voters constituting less than a majority in any proposed district were of great concern to the courts. Maximizing minority voting strength in absence of a voting-age majority requires "courts to make the very finest of political judgments about possibilities and effects—judgments well beyond their capacities." *Latino Political Action Committee v. City of Boston* 784 F.2d to 409, 412 (1st Cir., 1986).[9] Short of an aggregation of minority voters constituting more than 50 percent no standards other than raw intuition are available for the courts to address both liability and remedy issues. *See, Gingles v. Edminsten* 590 F. Supp. 345, 381 (E.D. NC., 1984) *aff'd* in part, rev'd in part *sub. nom. Thornburg v. Gingles, supra.*

Movement away from the *Gingles* standard requires judicial speculation. As Judge Cudahy wrote, such movement "invites courts to build castles in the air, based on quite speculative foundations." *McNeil* at 13a. That speculation is pointed up directly by Petitioners' argument that where more than two candidates run for a single office, minority voters would possess the abilty to elect. *See McNeil* at 12a-14a. Such an analysis depends solely on the facts and circumstances presented in a *single* election.

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[9]See, also *Terrazas v. Clements,* 581 F. Supp. 1329, 1348 (N.D. Tex., 1984) (three judge court) and *Seamon v. Upham,* 536 F. Supp. 931, 949 (E.D. Tex.), (three judge court) *rev'd on other grounds,* 456 U.S. 37 (1982).

Such hypotheticals can provide no reasoned basis for the court to find that a particular structure violates the Voting Rights Act, since equally plausible hypotheticals can be postulated supporting the opposing view.

The Act provides no right to proportional representation. Applying Section 2 to aggregations of minority voters constituting less than 50 percent of the voting-age population in any district would not only require the courts to speculate, but also would violate the clear Congressional intent by requiring courts usually to require proportional representation. *See, Gingles* 478 U.S. at 94 (O'Connor, J.), (concurring in judgment).

The standard set by *Gingles* is objective. It is solid and substantial. It does not require speculation. As applied by the Seventh Circuit, it affects only marginal cases where no effective remedy is available. The cases after *Gingles* are consistent with the clear principles it sets forth. There is no reason to revisit *Gingles* on this record.

———o———

CONCLUSION

The courts below have clearly and consistently applied the *Gingles* standards. There is no need for clarification. Certiorari should be denied.

Respectfully submitted,

ROBERT C. WALBAUM*
1231 South Eighth Street
Springfield, IL 62073
Phone: (217) 789-0911

PAUL BOWN
BROWN, HAY & STEPHENS
700 First National Bank
Building, P.O. Box 2459
Springfield, IL 62705
Phone: (217) 544-8491

*Counsel of Record

No. 88-1378

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

FRANK MCNEIL, *et al.*,
Petitioners,
v.
SPRINGFIELD PARK DISTRICT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICI CURIAE* OF THE MEXICAN AMERICAN LEGAL DEFENSE FUND, THE SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT, THE SOUTHERN REGIONAL COUNCIL, AND THE GEORGIA ASSOCIATION OF BLACK ELECTED OFFICIALS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

ANTONIA HERNANDEZ
NORMA CANTU
JOSE GARZA
JUDITH SANDERS-CASTRO *
ALBERT KAUFFMAN
GUADALUPE LUNA
MEXICAN AMERICAN LEGAL DEFENSE & EDUCATIONAL FUND
140 East Houston
Suite 300
San Antonio, Texas 78205
(512) 224-5476
Attorneys for Amicus Curiae Mexican American Legal Defense & Educational Fund

* Counsel of Record for *Amici Curiae*

ROLANDO L. RIOS
SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT
201 N. St. Mary's
Suite 521
San Antonio, Texas 78205
(512) 222-2102
Attorney for Amicus Curiae Southwest Voter Registration Education Project

MARY M. YOUNG CUMMINGS
307 Whitney Avenue
Albany, Georgia 31701
(912) 435-2679
Attorney for Amici Curiae Southern Regional Council and Georgia Association of Black Elected Officials

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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The Mexican American Legal Defense & Educational Fund, the Southwest Voter Registration Education Project, the Southern Regional Council, and the Georgia Association of Black Elected Officials seek leave to file jointly the annexed brief as *amici curiae*. The petitioners have consented to the filing of this brief, but the respondent has not.

Each *amicus* has a long-standing interest in the voting rights of minority citizens and the protection of those rights under the Voting Rights Act of 1965. The Mexican American Legal Defense & Educational Fund ("MALDEF") is a national non-profit organization that promotes and protects the civil rights of Hispanics in the United States in the areas of political access, education,

nployment and immigration. As part of its efforts to ıcourage more effective political participation of Hisanics in the electoral processes of this country, MALDEF as provided legal representation to minority citizens in umerous voting rights cases, and currently has an ave docket of voting rights litigation.

The Southwest Voter Registration Education Project "SVREP") is a privately funded tax exempt organizaon which conducts voter registration drives and sponrs voting rights litigation in order to increase political articipation among minority citizens in the southwestern nited States. SVREP has sponsored many challenges discriminatory at-large electoral systems on behalf of inority citizens, and has an active interest in the interretation and enforcement of Section 2 of the Voting ights Act, 42 U.S.C. § 1973.

The Southern Regional Council is the South's oldest iracial organization that has worked for equal opporunity among all peoples of the region through advocacy, esearch, education and technical assistance. Since its eginning in 1944, the Council has had a consistent and rimary concern for the right to vote of all citizens in ıe region. In the 1960s, the Council created the Voter ducation Project as a means to carry out its work in ıe field of voting and continues to operate several projts carrying out research and technical assistance to the oting rights of all Southerners.

The Georgia Association of Black Elected Officials is n organization of over 500 black elected officials in the ate of Georgia. It is deeply concerned with the contining use in the state of election procedures that perpetate the effects of past discrimination in voting. The ssociation's members are acutely aware of the special arriers facing the minority community in electing candates of its choice to office, and the Association works promote the equal access of all citizens to full political articipation.

This case presents an important issue concerning the scope of Section 2 of the Voting Rights Act and the legal standards that should govern claims that at-large electoral systems unlawfully dilute the voting strength of minority citizens in contravention of Section 2. The Seventh Circuit's interpretation of Section 2 is being followed by other courts and threatens to limit the protections of Section 2 in a manner that will directly affect the black, Hispanic, Native American and other minority citizens represented by *amici*. Thus, the significance of the decision is not limited to the immediate facts of the case, but concerns minority citizens nationwide.

The annexed brief addresses the obstacles to full enforcement of Section 2 created by the interpretation announced by the Seventh Circuit, and urges that review be granted to resolve the manifest conflict between the Seventh Circuit's holding and the congressional intent behind amended Section 2.

WHEREFORE, *amici* respectfully move the Court for leave to file the attached brief *amici curiae*.

Respectfully submitted,

ANTONIA HERNANDEZ
NORMA CANTU
JOSE GARZA
JUDITH SANDERS-CASTRO *
ALBERT KAUFFMAN
GUADALUPE LUNA
MEXICAN AMERICAN LEGAL DEFENSE & EDUCATIONAL FUND
140 East Houston
Suite 300
San Antonio, Texas 78205
(512) 224-5476
Attorneys for Amicus Curiae Mexican American Legal Defense & Educational Fund

* Counsel of Record for *Amici Curiae*

ROLANDO L. RIOS
SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT
201 N. St. Mary's
Suite 521
San Antonio, Texas 78205
(512) 222-2102
Attorney for Amicus Curiae Southwest Voter Registration Education Project

MARY M. YOUNG CUMMINGS
307 Whitney Avenue
Albany, Georgia 31701
(912) 435-2679
Attorney for Amici Curiae Southern Regional Council and Georgia Association of Black Elected Officials

QUESTION PRESENTED

When minority citizens can demonstrate, in an action challenging a racially discriminatory at-large electoral scheme, that they could elect candidates of their choice in the absence of the at-large system through single-member district elections, are they nevertheless excluded from the protections of Section 2 of the Voting Rights Act solely because minority citizens would not constitute a majority of the voting age population in a proposed single-member district?

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BRIEF *AMICI CURIAE* OF THE MEXICAN AMERICAN LEGAL DEFENSE & EDUCATIONAL FUND, THE SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT, THE SOUTHERN REGIONAL COUNCIL, AND THE GEORGIA ASSOCIATION OF BLACK ELECTED OFFICIALS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF *AMICI CURIAE*

The interest of *amici curiae* Mexican American Legal Defense & Educational Fund, the Southwest Voter Registration Education Project, the Southern Regional Council, and the Georgia Association of Black Elected Officials is set out in the motion for leave to file this brief which is appended hereto.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question whether one of the general observations made in *Thornburg v. Gingles*, 478 U.S. 30 (1986), regarding vote dilution claims under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, as amended, may properly be applied by the lower courts as a rigid and strictly numerical test requiring dismissal, without trial, of claims that are otherwise meritorious under the standards that Congress intended for evaluating Section 2 actions. *Amici* believe that the decision of the Court of Appeals for the Seventh Circuit,[1] and decisions by other lower courts that have addressed the issue, have limited the scope of Section 2 in a manner that directly conflicts with Congress' intent. The enforcement of a *per se* rule requiring minority voters in Section 2 cases to prove that they would constitute 50 percent of the voting age population in a proposed single-member district is totally unsupported by the language and legislative history of Section 2, conflicts with the reasoning of this Court's decision in *Thornburg v. Gingles*, and ignores other factors that would allow minority voters to elect candidates of their choice in a single-member district even though they do not constitute a majority of the voting age population.

Because this case presents a critically important issue that has arisen in a number of Section 2 cases, and because there is disagreement among the lower courts on this issue, this Court should grant certiorari to review the decision of the Court of Appeals for the Seventh Circuit.

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[1] *McNeil v. Springfield Park District*, 851 F.2d 937 (7th Cir. 1988) (printed in Appendix to Petition for Writ of Certiorari, pp. 1a-21a).

ARGUMENT

THE SEVENTH CIRCUIT'S RULE REQUIRING DISMISSAL OF A SECTION 2 CLAIM WITHOUT A TRIAL, SOLELY ON THE GROUND THAT MINORITY CITIZENS WILL CONSTITUTE SLIGHTLY LESS THAN A MAJORITY OF THE VOTING AGE POPULATION UNDER A PROPOSED REMEDIAL PLAN, CONFLICTS WITH THE CONGRESSIONAL INTENT BEHIND SECTION 2 AND WILL INHIBIT FULL ENFORCEMENT OF THE VOTING RIGHTS ACT.

The Voting Rights Act Amendments of 1982 were preceded by extensive Congressional hearings and detailed consideration by the House and Senate Committees on the Judiciary and their responsible subcommittees. *See* Senate Report No. 97-417, 97th Cong., 2d Sess., at pp. 3-4 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 177 (hereafter, "S. Rep." or "Senate Report"). The Senate Report accompanying the legislation, which surveyed the legislative record and contained a lengthy analysis of each of the proposed amendments, including the amendment to Section 2, constitutes "the statement for the record of the intended meaning and operation of this bill." *Id.* at 1. *See also Thornburg v. Gingles*, 478 U.S. at 43 n.7 (noting that Senate Report is authoritative source for interpretation of amended Section 2).

The Senate Report discussed at length the history of litigation under Section 2 since its enactment in 1965, and recognized that courts would continue to be called upon to apply amended Section 2 in a wide variety of factual settings. S. Rep. at 19-24, 27-29. Taking into account the diversity of electoral systems and practices that could result in the submergence of the voting rights of minority citizens, amended Section 2 prescribed a "totality of circumstances" standard, and the Senate Report spelled out a broad array of factors that would

be relevant in determining whether a particular electoral system violates the rights secured by Section 2.[2]

While the factors identified in the Senate Report are an important expression of the congressional intent behind amended Section 2, equally important is the Senate Report's repeated emphasis that no one factor or set of factors should be treated as talismanic in analyzing a claim of vote dilution. As the Senate Report states:

> The courts ordinarily have not used these factors, nor does the Committee intend them to be used, as a

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[2] The "typical factors" listed in the Senate Report include:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

S. Rep. at 28-29 (footnotes omitted). The Senate Report also notes two additional factors that cases prior to *City of Mobile v. Bolden*, 446 U.S. 55 (1980), had occasionally considered as well: whether elected officials have been unresponsive to the needs of the minority group, and whether the state or local policy underlying the use of the challenged electoral device is tenuous. *Id.* at 29 (footnotes omitted).

> mechanical "point counting" device. The failure of plaintiff to establish any particular factor, is not rebuttal evidence of non-dilution. Rather, the provision requires the court's overall judgment, based on the totality of circumstances and guided by those relevant factors in the particular case, of whether the voting strength of minority voters is, in the language of *Fortson* [*v. Dorsey*, 379 U.S. 433 (1965)] and *Burns* [*v. Richardson*, 384 U.S. 73 (1966)], "minimized or cancelled out."

S. Rep. at 29 n.118. The Senate Report further emphasizes that "[t]he [pre-*Bolden*] cases demonstrate, and the Committee intends[,] that there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." S. Rep. at 29.

In this case, however, the Court of Appeals for the Seventh Circuit held that a claim of unlawful vote dilution under Section 2 may never survive summary judgment, regardless of the facts and evidence supporting the claim, if minority voters will not constitute more than 50 percent of the voting age population in one or more single-member districts proposed as a remedy for the Section 2 violation. The Seventh Circuit's decision thus abandons the "searching practical evaluation of the 'past and present reality'" intended by Congress in amending Section 2, *see* S.Rep. at 30 (footnote omitted), *quoting White v. Regester*, 412 U.S. 755, 770 (1973), and substitutes a mechanical formula designed to promote "judicial economy" in disposing of voting rights claims. Appendix to Petition for Certiorari at 11a; 851 F.2d at 943. As the court of appeals acknowledged, the single factor it employed to deny petitioners a trial does not even appear among the factors discussed in the Senate Report and was not a part of the pre-*Bolden* case law which Congress codified in amending Section 2.[3] App. at 6a-7a; 851 F.2d at 941.

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[3] Indeed, in a pre-1982 case involving an at-large electoral scheme under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, a *per*

There is disagreement among the lower federal courts on whether the absence of a 50 percent voting age population is an absolute bar to a Section 2 claim. While some lower courts have rejected such a strict numerical test as a *per se* requirement under Section 2, *see East Jefferson Coalition v. Parish of Jefferson*, 691 F. Supp. 991, 1005-1008 (E.D. La. 1988), other courts have held, like the Seventh Circuit, that a voting-age population majority is an absolute precondition to a Section 2 claim. *See* cases cited at pp. 19-20 of the Petition for Writ of Certiorari. Proper resolution of the issue presented in this case is therefore crucial to the vindication of the rights of minority citizens throughout the country.

While the Seventh Circuit relied upon a statement in *Gingles* for the result it reached, *Gingles* does not require the dramatic departure from the language and intent of

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se majority-population requirement was rejected. *Wilkes County, Georgia v. United States*, 450 F. Supp. 1171 (D.D.C.) (three-judge court), *aff'd*, 439 U.S. 999 (1978). *Wilkes County* held that a change to an at-large electoral scheme would have a racially discriminatory effect even though blacks did not comprise a majority of the voting age population in any of the single-member districts from which representatives were previously elected. Because *Wilkes County* was an action under Section 5, which requires covered localities to obtain preclearance of electoral changes, the effect of the court's decision rejecting the at-large system was to leave in place the previous single-member districts (although the court noted that the districts were malapportioned and that reapportionment might result in a majority-black district). The *Wilkes County* court specifically rejected the argument that black voters' failure to constitute a majority in the single-member districts meant they would not be harmed by an at-large system. 450 F. Supp. at 1176. *See also Major v. Treen*, 574 F. Supp. 325, 330-336, 351-352 (E.D. La. 1983) (three-judge court) (legislature's rejection of reapportionment plan that would have created a district with a 54 percent black total population and a 43.5 percent black registered voter population, in favor of a plan with only a 37.8 percent black registered voter population, violated amended Section 2; court credited evidence that voting patterns prevalent in New Orleans could allow black voters an effective role if the rejected plan were adopted, even though blacks would constitute only 43.5 percent of the registered voters).

Section 2 which the Seventh Circuit's decision entails. The court of appeals' error lies in its failure to give any weight to this Court's explanation of the purpose of considering the size and geographical compactness of the minority population. An inquiry into these facts, as this Court carefully explained, was relevant because "[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." 478 U.S. at 50 n.17 (emphasis in original).

Thus, consideration of the size and compactness of the minority population was not mandated in *Gingles* as an end in itself, but was identified as a relevant circumstance only because of the necessity of establishing a relationship between the challenged electoral system and the minority group's inability to elect representatives. Where the potential remedy proposed by plaintiffs will, as a factual matter, allow them to elect representatives of their choice, the element with which this portion of *Gingles* was concerned is fully satisfied.

An "intensely local appraisal" [4] of the facts of a particular case may well reveal a variety of factors that would allow minority voters to elect candidates of their choice in a single-member district system, despite the lack of a voting age population majority. For example, in jurisdictions where the Democratic primary generally determines the outcome of the general election, and a greater percentage of blacks than whites are registered Democrats, an absolute voting age black majority may not be necessary to allow black electoral success in a single-member district. Other factors may include the presence of some white cross-over voting for minority candidates, the lack of a majority vote requirement, disproportionately lower white voter registration and/or

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[4] *Gingles*, 478 U.S. at 79, *quoting Rogers v. Lodge*, 458 U.S. 613, 622 (1982).

turnout rates, or a relatively high degree of political organization in the minority community.

Rather than examining such facts before affirming the grant of summary judgment, the court of appeals in this case specifically held that such evidence is irrelevant, and may not be considered, if plaintiffs fail to meet the strictly numerical 50 percent voting age population threshold. Thus, the court of appeals stated that "[b]ecause of [our] holding, *we do not consider* plaintiffs' claim that white cross-over votes would enable black candidates to prevail in the proposed districts." App. at 11a n.9; 851 F.2d at 943 n.9 (emphasis supplied). The court also declined to give any weight to the fact that, unlike the elections at issue in *Gingles*, the Springfield Park District elections could be won with a plurality, rather than a majority, of the vote.

Neither this Court nor Congress intended to confine analysis of Section 2 violations within the straitjacket created by the Seventh Circuit's decision. As this Court recognized in explaining why the "clearly erroneous" standard of Fed. R. Civ. P. 52 is applicable to factual findings in Section 2 cases:

> As both amended § 2 and its legislative history make clear, in evaluating a statutory claim of vote dilution through districting, the trial court is to consider the "totality of the circumstances" and to determine, based "upon a searching practical evaluation of the 'past and present reality,'" S Rep 30 (footnote omitted), whether the political process is equally open to minority voters. " 'This determination is peculiarly dependent upon the facts of each case,' " *Rogers* [*v. Lodge*, 458 U.S. 613 (1982)] at 621, *quoting Nevett v. Sides*, 571 F.2d 209, 224 (5th Cir. 1978), and requires "an intensely local appraisal of the design and impact" of the contested electoral mechanisms. [*Rogers*,] 458 U.S., at 622.

478 U.S. at 79.

The conflict between the Seventh Circuit's ruling and Congress' clearly expressed intent warrants review by this Court to clarify its holding in *Gingles* and to forestall the further erosion of Section 2's broad scope through the application of rigid tests not required by the statute. Indeed, the necessity of review by this Court is underscored by other lower court decisions that have embarked on the perilous course of creating abstract "tests", further and further removed from the Senate Report factors and the rationale of this Court's decision in *Gingles*, for evaluating Section 2 claims. *See, e.g., Solomon v. Liberty County, Florida*, No. 87-3406 (11th Cir. December 12, 1988), slip op. at 7 (establishing a four-part test which is not mentioned in the language of Section 2, in the Senate Report, or in *Gingles*, but which the Eleventh Circuit believes should be followed by district courts in order to satisfy the "three elements of the *Gingles* gloss", which are in turn deemed a gloss on the totality-of-circumstances standard intended by Congress).[5] The crucial role played by amended Section 2 in securing minority citizens' right to full political participation must not be curtailed through unwarranted limits on the fact-intensive inquiry prescribed by Congress for vote dilution suits.

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[5] The "four-question method of analysis," slip op. at 11, that district courts in the Eleventh Circuit must now use is as follows:

> (1) Is the minority group significantly underrepresented in proportion to its percentage of the total electorate? (2) If so, could the minority group achieve roughly proportional representation but for the multimember electoral system? (3) If so, can the minority group establish that the discriminatory effect of the challenged electoral system is driven by racial bias in the community or its political system? (4) If so, can the minority group establish that such bias will continue to prevent the minority group from having equal access to the political process?

Slip op. at 7. This four-part test is restated in slightly different language at slip op., 10-11.

CONCLUSION

The petition for a writ of certiorari to review the decision of the Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

ANTONIA HERNANDEZ
NORMA CANTU
JOSE GARZA
JUDITH SANDERS-CASTRO *
ALBERT KAUFFMAN
GUADALUPE LUNA
MEXICAN AMERICAN LEGAL DEFENSE & EDUCATIONAL FUND
140 East Houston
Suite 300
San Antonio, Texas 78205
(512) 224-5476
Attorneys for Amicus Curiae Mexican American Legal Defense & Educational Fund

* Counsel of Record for *Amici Curiae*

ROLANDO L. RIOS
SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT
201 N. St. Mary's
Suite 521
San Antonio, Texas 78205
(512) 222-2102
Attorney for Amicus Curiae Southwest Voter Registration Education Project

MARY M. YOUNG CUMMINGS
307 Whitney Avenue
Albany, Georgia 31701
(912) 435-2679
Attorney for Amici Curiae Southern Regional Council and Georgia Association of Black Elected Officials

(4) 88-1378

No. A-469

Supreme Court, U.S.
FILED
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court of the United States

October Term, 1988

FRANK MCNEIL, et al.,

Petitioners,

v.

SPRINGFIELD PARK DISTRICT and SPRINGFIELD SCHOOL DISTRICT NO. 186,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JEWEL S. LAFONTANT*
JAMES C. FRANCZEK, JR.
MICHAEL G. CLEVELAND
ANDREA R. WAINTROOB
VEDDER, PRICE, KAUFMAN & KAMMHOLZ
222 North LaSalle Street
Chicago, IL 60601
(312) 609-7500

JOHN L. SWARTZ
GIFFIN, WINNING, COHEN & BODEWES P.C.
600 Myers Building
P.O. Box 2117
Springfield, IL 62705
(217) 525-1571

Attorneys for Respondents
**Counsel of Record*

American Reprographics Management, Inc.™ (312) 332-ARMI (800-999-6239)

LIST OF PARTIES

The parties in this Court are as follows:

Petitioners: Frank McNeil, William H. Washington, Sr., Rudolph V. Davenport, Archie Lawrence, and Howard Veal, Sr.

Respondents: Springfield Park District and Springfield School District No. 186.

Springfield School District No. 186 has a continuing interest in this case and should be listed as a Respondent contrary to the incorrect claim of the Petitioners that the case is moot. The Petitioners' claim is discussed in the body of this brief.

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No. A-469

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STATEMENT OF THE CASE

The Petitioners' Statement of the Case is inaccurate insofar as they claim (Footnote 1, page 3) that this case is moot with respect to Springfield School District No. 186 ("District"). It is true that on November 8, 1988, four months after the Seventh Circuit affirmed the District Court's summary judgment in favor of *both* the Springfield Park District and the Springfield School District No. 186, voters in the school district approved a

referendum under the Illinois School Code[1] to henceforth elect school board members from single-member districts. This change, however, did not moot the case with respect to the District.

The Petitioners have failed to inform the Court of the fact that, on December 7, 1988, they filed before the Seventh Circuit a Motion to Recall Mandate and Dismiss this Cause as Moot. A copy of that Motion is attached as Appendix A. The District responded on December 21, 1988. A copy of that response is attached as Appendix B. On February 13, 1989, the Seventh Circuit issued an order denying the Petitioners' Motion. This order was issued four days before the Petitioners filed their Petition for a Writ of Certiorari. We attach a copy of the court's Order as Appendix C. Contrary to Supreme Court Rule 21.1(k)(i) and (ii), which requires Petitioners to append copies of any orders in this or companion cases that were rendered by the court whose decision the petitioners seek to have reviewed, the Petitioners failed to inform the Court of this order or to append a copy to their petition.

SUMMARY OF ARGUMENT

Contrary to the claim of the Petitioners, this case is not moot with respect to Springfield School District No. 186. Although it is true that a referendum occurred that changed the election system in the District from at-large representation to single-member districts, the change was made independent of the Petitioners' lawsuit, does not achieve the result they sought in

---

[1] Ch. 122, ¶9-22 provides in pertinent part, as follows:

> A school board may, on its own motion, or shall, upon the petition of the lesser of 2,500 or 5% of the voters registered in the district, order submitted to the voters of the district at a regular school election or at the general election, the proposition for the election of board members by school board district rather than at large, and such proposition shall thereupon be certified by the secretary of the board for submission. If the proposition is approved by a majority of those voting on the proposition, the board shall divide the school district into 7 school board districts, each of which must be compact and contiguous and substantially equal in population to each other district.

ILL. REV. STAT. ch. 122, ¶9-22 (1987)

that lawsuit and does not prevent the District Court from granting the relief requested. Therefore, this case is not moot with respect to the District.

ARGUMENT

This Brief is directed solely to the Petitioners' claim that Springfield School District No. 186 is no longer a party to this case because the portion of the case that applied to the District is moot. For the reasons discussed below, this claim is incorrect. The Petitioners have already made this claim to the Seventh Circuit which rejected it. Rather than acknowledging that denial and the precedent which supports it, the Petitioners seek to accomplish the result explicitly rejected by Seventh Circuit by indirection in this Court. A sentence in their List of Parties and a footnote in their Statement of the Case is not the proper place or manner to assert that a case has become moot, especially when the same claim has already been litigated and rejected in the court below.

Here, as in the Seventh Circuit, the Petitioners misconceive the doctrine of mootness. As this Court has explained, the purpose of declaring a case moot is that it:

> clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance.

United States v. Munsingwear, 340 U.S. 36, 40 (1950). Thus, a case may be declared moot if an event occurs prior to appeal that makes it impossible for relief to be granted if the appellate court reverses the court below. *See, e.g. In Re Ghandtchi,* 705 F.2d 1315 (11th Cir. 1983) (issue of bail pending an extradition hearing became moot when the hearing was held and the individual was taken into custody pending extradition); and *Bumpus v. Clark,* 702 F.2d 826 (9th Cir. 1983) (procedural questions concerning closing of a nursing home became moot when the home closed while the appeal was pending). Here, nothing has occurred that would prevent a court from granting the relief requested if the law required it and nothing has occurred which suggests that the path should be cleared for relitigation of this meritless claim.

The Petitioners' claim that the referendum requiring the District to adopt a single district election plan accomplished the goal of their lawsuit is incorrect. The goal of their lawsuit was to prove that the District's at-large system diluted the voting rights of black voters.

The Petitioners did not achieve their goal. As a result of the School Code referendum on November 8, the Board must develop a redistricting plan but the prior decisions in this case establish that, on the basis of current demographic information, it is impossible to create a district with a majority black voting age population and the Board has no legal obligation to create a district with a majority black total population. It is speculative at best for the Petitioners to assume that the redistricting plan adopted by the Board will be the same as or similar to the one they hoped to achieve through this lawsuit.

At the time the Seventh Circuit rendered its judgment in this case, all the required elements of justiciability were present. Accordingly, the judgment of the Seventh Circuit that the Petitioners could not maintain a Voting Rights Act claim against the School District remains binding upon them. All elements of justiciability continue to be present.

Apparently, the Petitioners here no longer wish to pursue their action against the School Board. While they are entitled to abandon their claim, as a matter of law, their loss of interest does not moot the prior judgment nor does it remove the School Board as a party to their appeal.

The District waives its right to file a response on the substantive questions presented by the Petition. However, the District will file a response if requested by the Court, and it stands on its right to fully participate in proceedings before the Court if the Court grants the Petition.

CONCLUSION

For the foregoing reasons, the Petitioners' claim that this case is moot with respect to the Springfield School District No. 186 is incorrect, and the District should be included as a Respondent in the case.

Respectfully submitted,

JEWEL S. LAFONTANT*
JAMES C. FRANCZEK, JR.
MICHAEL G. CLEVELAND
ANDREA R. WAINTROOB
VEDDER, PRICE, KAUFMAN
& KAMMHOLZ
222 North LaSalle Street
Chicago, IL 60601
(312) 609-7500

JOHN L. SWARTZ
GIFFIN, WINNING, COHEN & BODEWES P.C.
600 Myers Building
P.O. Box 2117
Springfield, IL 62705
(217) 525-1571

Attorneys for Respondents
**Counsel of Record*

APPENDIX

APPENDIX - A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 87-2478

FRANK McNEIL, et al., individually and as representative of a certified class,
Plaintiffs-Appellants,

vs.

SPRINGFIELD PARK DISTRICT and SPRINGFIELD SCHOOL DISTRICT NO. 186,
Defendant-Appellees.

Appeal from the United States District Court for the Central District of Illinois, Springfield Division

Case Nos. 87 C 3017 and 87 C 3016

Honorable **Richard Mills** Judge Presiding

MOTION TO RECALL MANDATE AND TO DISMISS THIS CAUSE AS MOOT

NOW COME Plaintiffs, Frank McNeil, et al, by and through their attorneys, and ask this court to recall its mandate, to vacate it decision in Case No. 87-3017 (District Court Case Number), and to remand the school district case to the district court with directions to vacate its decision and to dismiss this cause for mootness. In support of this motion, plaintiffs state as follows:

1. This court issued its mandate on September 21, 1988, affirming the district court's grant of summary judgment to defendants in this cause in both the Springfield Park District and School District cases.

2. Pursuant to 28 U.S.C. Sec. 2101(c) and Supreme Court Rule 20.2, plaintiffs have 90 days from September 21 in which to file a petition for writ of certiorari. In the park district case, plaintiffs will timely file a petition for a writ of certiorari.

3. Plaintiffs intended to file a petition for a writ of certiorari in the school district case as well; however, further review of this case is unnecessary and imprudent, because a referendum passed by the voters on November 8, 1988, has mooted issues in the school district lawsuit.

4. On November 8, a referendum was passed in the school district, which provides that the school district will henceforth elect its representatives by district, rather than at-large. This is the relief which plaintiffs have sought to obtain in this lawsuit. The election results were certified to the school district on November 10, 1988.

5. Plaintiffs wish to separate the school district case from the park district case in order to clarify the record which will be presented to the United States Supreme Court.

6. Furthermore, Plaintiffs represent to the court that the lawsuit was a substantial factor and a significant catalyst in the passage of the November referendum. Accordingly, despite this court's adverse decision, plaintiffs assert that, under the law, they are "prevailing parties" for purposes of an award of attorneys' fees under 42 U.S.C. Sec. 1983(1)(e).

7. Despite the adverse decision by this court, plaintiffs had, and until the November referendum, continued to have a colorable claim of a Voting Rights Act violation. Indeed, this court acknowledged in its decision that plaintiffs possibly had a meritorious claim of vote dilution, *see* 851 F.2d at 942-943, but applied a per se rule of a majority voting age population requirement which was found to bar plaintiffs suit.

8. Further review of this court's decision may have been available to plaintiffs, except for the November referendum, and plaintiffs will seek such review in the park district case. Plaintiffs' argument was and still is a colorable one, and plaintiffs are prepared to substantiate their assertion that their lawsuit was a substantial factor in the passage of the referendum.

9. Accordingly, plaintiffs ask this court to recall its mandate and to remand the cause to the district court with directions that the district court vacate its decision and dismiss the case as moot. Plaintiffs further ask this court either to rule as a matter

of law that plaintiffs are the prevailing parties for purposes of the fee award, or to direct the district court to make a determination as to whether plaintiffs are the prevailing parties and for further proceedings consistent with its opinion.

WHEREFORE, for the foregoing reasons, plaintiffs ask this court to recall its mandate, to vacate its decision, and to remand this cause to the district court with directions to vacate its opinion as moot.

Respectfully submitted,

/s/ JAMES C. CRAVEN,

JAMES C. CRAVEN, P.C
1005 North Seventh Street
P.O. Box 1207
Springfield, IL 62705

WILLIAM L. ROBINSON
FRANK R. PARKER
ROBERT B. MCDUFF
SAMUEL ISSACHAROFF
Lawyers' Committee for
Civil Rights Under Law
1400 Eye Street, N.W.
Suite #400
Washington, D.C. 20005

APPENDIX - B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 87-2478

FRANK McNEIL, et al.,
Plaintiffs-Appellants,

v.

SPRINGFIELD PARK DISTRICT AND SPRINGFIELD SCHOOL DISTRICT NO. 186,
Defendant-Appellees.

Appeal from the United States District Court for the Central District of Illinois, Springfield Division

Case Nos. 87 C 3017 and 87 C 3016

Honorable **Richard Mills** Judge Presiding.

RESPONSE OF BOARD OF EDUCATION TO MOTION TO RECALL MANDATE AND DISMISS THIS CAUSE AS MOOT

The Plaintiffs' Motion to Recall Mandate and to Dismiss this Cause as Moot misconstrues the doctrine of mootness, and their effort to have themselves declared the prevailing party is directly contrary to and in disregard of the law of this Circuit. Accordingly, the Board of Education of Springfield School District 186 asks that the Plaintiffs' motion be denied and that the Board be awarded its attorneys' fees and costs of responding to the motion under Appellate Rule 38 and the Voting Rights Act.

A. The History of the Case

A brief review of the record facts of this case demonstrates that the case is not moot and that the Plaintiffs did not prevail. The Plaintiffs, Frank McNeil, et al, represent a class of all black voters residing within Springfield School District 186 ("District").

They brought this action under the Voting Rights Act, 42 U.S.C. §1973 (1982), against the Board of Education of Springfield School District 186 ("Board") on January 20, 1987 claiming that the at-large system of electing Board members unlawfully diluted black voting strength. In March, 1987, they filed an amended complaint in which they asked the court to " . . . divide the park and school districts into seven single-member districts, one of which would have a black majority population." 851 F.2d 937, 939 (7th Cir. 1988.).[1]

On June 3, 1987, the Board moved for summary judgment. The District Court granted the Board's motion on August 13, 1987 on the ground that the plaintiffs failed to satisfy the "necessary preconditions" established by the Supreme Court in *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752 (1986) for challenging an at-large district voting scheme. Specifically, the District Court held that the Plaintiffs did not satisfy the *Gingles* requirement that they demonstrate that the minority group is "sufficiently large and geographically compact to constitute a minority in a single-member district." 107 S.Ct. at 2766. The Plaintiffs appealed to this Court. This Court affirmed the District Court's ruling on July 8, 1988 stating:

> This is precisely the kind of case where the Court thought invocation of the Voting Rights Act would be inappropriate. Appellants cannot show that the at-large system at issue here impairs their ability to elect candidates of their choice.

851 F.2d at 948. On September 21, 1988, this Court denied the Plaintiffs' motion for reconsideration and suggestion of rehearing *en banc* and issued its mandate.

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[1] The Plaintiffs filed a motion for a preliminary injunction on May 19, 1987. With that motion, they submitted an affidavit from their expert, Dr. Race Davies, identifying the proposed single-member district which they wished to have created.

On November 8, 1988, the voters of Springfield School District No. 186 approved a referendum under the Illinois School Code, Ill. Rev. Stat. Ch. 122 ¶9-22[2], to divide the district into seven single-member districts for Board elections.

B. This Action Is Not Moot

The Plaintiffs' claim that the November 8 referendum moots this case is erroneous. As explained by the Supreme Court, the purpose of declaring a case moot is that it:

> clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance.

United States v. Munsingwear, 340 U.S. 36, 40, 95 L.Ed 2d 36, 41 (1950). It is extraordinary for a court of appeals to declare a case moot after it has entered a final judgment. Indeed, our research has disclosed no cases in which this Court has done so and the Plaintiffs have cited none. The Third Circuit has explained why it is highly unusual to declare a case moot after final judgment has been entered:

> It is not surprising that there are relatively few precedents dealing with the question whether a court of appeals possesses the authority to recall a mandate. Undoubtedly, litigants may have been deterred from

---

[2] Ch. 122, ¶9-22 provides in pertinent part, as follows:

> A school board may, on its own motion, or shall, upon the petition of the lesser of 2,500 or 5% of the voters registered in the district, order submitted to the voters of the district at a regular school election or at the general election, the proposition for the election of board members by school board district rather than at large, and such proposition shall thereupon be certified by the secretary of the board for submission. If the proposition is approved by a majority of those voting on the proposition, the board shall divide the school district into 7 school board districts, each of which must be compact and contiguous and substantially equal in population to each other district.

The November 8th referendum was held as a result of a petition by the voters and not at the motion of the School Board.

> bringing 'recall' petitions by the weighty policy interests which undergird the salutary principle that there should be an end to a controversy in litigation: Not only should parties be entitled to rely on a judgment as the final settlement of their dispute, but courts must be able to clear their dockets of decided cases in order to permit them to hear new controversies which have arisen and require resolution by the judicial process. Put another way, parties should be afforded ample opportunity to litigate their claims, but once a final disposition is reached they should not expect that the good offices of the court will be available for a chance to press their claims anew.

American Iron and Steel Institute v. EPA, 560 F.2d 589 (3rd Cir. 1977) at 592. In *Armster v. United States District Court,* 806 F.2d 1347, 1353 (9th Cir. 1986), the Ninth Circuit declined to declare a case moot on the theory that the case had become moot because the defendants had voluntarily ceased the challenged activity after issuance of the court's decision (*Id.* at 1355). The court explained:

> When we rendered our decision in *Armster I,* all the required aspects of justiciability were present: ripeness, adverseness, etc.

Id. at 1354. Here, too, this Court rendered its decision at a time when all required aspects of justiciability were present.

The Plaintiffs base their claim of mootness on the contention that the referendum "accomplished the exact goal of plaintiffs' lawsuit." (Pl. Br. p. 5). This is incorrect. The lawsuit sought to have the at-large election system for school board members declared unlawful under the Voting Rights Act. Had the Plaintiffs succeeded, in order to cure the violation the Board would have had to adopt a redistricting plan which contained a majority black district. And, indeed, with their motion for a preliminary injunction, the Plaintiffs included a proposed district with a black total population majority which had been drawn by their expert. Although the District Court would have given the Board an opportunity to develop a redistricting plan, *Jones v. City of Lubbock,* 727 F.2d 364, 367 *reh. denied,* 730 F.2d 233 (5th Cir.

1984), *Major v. Treen,* 574 F. Supp. 325, 355 (E.D. La. 1983) (three judge panel), the District Court would have had ultimate approval of any plan submitted by the Board.

The Plaintiffs did not achieve that goal. As a result of the School Code referendum on November 8, the board must develop a redistricting plan but the prior decisions in this case establish that, on the basis of current demographic information, it is impossible to create a district with a majority black voting age population and the Board has no legal obligation to create a district with a majority black total population. The prior decisions in this case estop the Plaintiffs from bringing a Voting Rights Act based on current demographic information if the Board does not adopt a plan containing a district which is majority black in total population. In adopting a redistricting plan, the Board will obtain the input of all of its constituencies–parents, students, taxpayers and the citizens generally–and ensure that its plan is in accord with its obligations under applicable federal and state law; but it is speculative at best for the Plaintiffs to assume that the redistricting plan adopted by the Board will be the same as or similar to the one they hoped to achieve through this lawsuit.

The Plaintiffs have cited no cases which support their claim that this case is moot. The two cases they do cite, *In Re Ghandtchi,* 705 F.2d 1315 (11th Cir. 1983) and *Bumpus v. Clark,* 702 F.2d 826 (9th Cir. 1983), are far off the mark. In both cases events occurred while the case was on appeal which made it impossible for relief to be granted if the court of appeals reversed the district court. In *In Re Ghandtchi,* the issue on appeal was whether bail should have been granted pending an extradition hearing. While the appeal was pending, the extradition hearing was held and the individual was taken into custody pending extradition. Similarly, in *Bumpus,* the issue was whether a nursing home could be closed. Unbeknownst to the appellate court, the nursing home was closed while the case was on appeal and before the court issued its decision. The appellate court withdrew its opinion when it learned that fact, stating "We have no Article III jurisdiction over cases in which the district court has lost the power to grant relief if the appellate court were to reverse the judgment." 702 F.2d at 827. In contrast, this Court decided this case at a time when the district court had full power to grant

relief. And, indeed, notwithstanding the referendum, the District Court's power to order the requested remedy still exists if the Plaintiffs were to prevail before the U.S. Supreme Court and were able to prove a violation of the Voting Rights Act.

C. The Plaintiffs Are Not Prevailing Parties

The Plaintiffs have now lost this case before Judge Mills, a three-member panel of this Court and the entire bench of this Court with respect to their motion for reconsideration. Yet they ask this Court to declare that they are prevailing parties[3]. This attempt to rewrite history is contrary to the law as well as the facts. This Court has emphatically rejected the notion that a plaintiff who loses on the merits of his claim can be a prevailing party, stating:

> Here, we now know, the plaintiffs lost–unless it is possible to win by losing, a proposition we reject.

Palmer v. City of Chicago, 806 F.2d 1316, 1321 (7th Cir. 1986), *cert. denied,* ____ U.S. ____, 107 S.Ct. 2180 (1987). Similar to the Plaintiffs' claim here, in *Palmer,* the plaintiffs argued that they should be considered prevailing parties because, even though they had lost on the merits of their action challenging the constitutionality of the City of Chicago police department's alleged practice of concealing exculpatory materials contained in informal "street files", the department ceased to discard exculpatory materials after the suit was brought. The Seventh Circuit rejected this theory, explaining:

> this kind of benefit cannot support a fee award. 'If it has been judicially determined that defendants' conduct, however beneficial it may be to plaintiffs' interests, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense.' *Nadeau v. Helgemoe,* 581 F.2d 275, 281 (1st Cir. 1978).

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[3] The attorneys' fees provision of the Voting Rights Act, 42 U.S.C. §19731(e) is interpreted consistently with other civil rights act attorneys' fee provisions. *Riddle v. Nat'l Democratic Party,* 624 F.2d 539, 543 (5th Cir. 1980).

806 F.2d at 1322. The Court went on to explain:

> The civil rights attorneys' fees statute does not reward a plaintiff who brings an unmeritorious suit, merely because by some fortuity the suit brings about changes favorable to him . . . . The idea that litigation can be a weapon for obtaining benefits irrespective of the merits of the litigation underlies the torts of malicious prosecution and abuse of process . . . Because the suit was not frivolous, the city (meaning the taxpayers) must swallow the costs of the defense. It is not, however required to pay its opponents' costs. *The suit was not ineffectual or frivolous, but it failed, and people who bring losing suits must bear their own attorneys' fees.* (emphasis added)

806 F.2d at 1323. This case provides far less ground than *Palmer* to argue that the Plaintiffs achieved a favorable result through this litigation. In contrast to *Palmer,* the Plaintiffs here never obtained a preliminary injunction. And, as we discussed above, in contrast to *Palmer,* the Plaintiffs here did not obtain the relief they sought nor did the Defendant school district take any action as a result of the Plaintiff's lawsuit.

Palmer is dispositive of the Plaintiffs' motion. The District Court and this Court both determined that the Plaintiffs' claim was without merit. Even if one accepted the Plaintiffs' implausible claim (which we discuss *infra*) that their continuing losses in this case somehow prompted the voters of the District to adopt a single member districting scheme, the action of the voters was legally gratuitous and does not convert these losing Plaintiffs into winners.

The Plaintiffs have cited two cases in support of their argument that they should be deemed prevailing parties. Neither case is on point. In *Leroy v. City of Houston,* 831 F.2d 576 (5th Cir. 1987), *cert. denied,* ____ U.S. ____, 108 S.Ct. 1735 (1988)[4], a

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[4] The Plaintiffs cite to the District, not the Appellate Court opinion in *Leroy* (Pl. Br. p. 4) in spite of the fact that the Fifth Circuit disagreed "with significant portions of the District Court's legal analysis" and, accordingly, reversed and remanded. 831 F.2d at 578.

referendum was passed approving a mixed single district, at-large plan after the plaintiffs had lost before the District Court but while the appeal was still pending on that case. Moreover, after the plaintiffs lost the original suit, the United States Attorney General filed a preclearance suit as well as an amicus brief favoring the plaintiffs in the appeal. The court concluded that the plaintiffs were entitled to attorneys' fees on the theory that their lawsuit was a significant catalyst to the defendant's adoption of single-member districts.

Among the features that substantially distinguish *Leroy* from this case are two threshold differences which are fatal to Plaintiff's assertions. First, in contrast to *Leroy* where the Defendant City was the "catalyst" to changing the electoral process, the Defendant in this lawsuit, the Board of Education, did not initiate the referendum which passed on November 8. Under Section 9-22 of the Illinois School Code, Ill. Rev. Stat. Ch. 122 ¶9-22, that referendum was on the ballot because the requisite number of voters submitted a petition to have it there. The action of the voters and their motivation cannot be imputed to the defendant. Second, in *Leroy* the referendum was held *prior* to the Appellate Court's decision and the court specifically noted that the earlier litigation "although lost at trial by the plaintiffs, was widely expected to be reversed and remanded and would pose a continuing threat of judicial intervention in the City's districting." (831 F.2d at 581). Here, the referendum passed after this Court had affirmed that the Plaintiffs' action was without merit and denied their motion for a rehearing and when only the speculative possibility of a writ to the U.S. Supreme Court existed. The Plaintiffs in this case cannot be said to have "jumped on the redistricting train too early" as in *Leroy,* (831 F.2d at 580), the decision of this Court and the District Court establish that there was no train.

Similarly, in *Kirksey v. Danks,* 608 F.Supp. 1448 (D.Miss. 1985), the referendum the defendant City held to change its form of government came on the day the plaintiffs' case went to trial. The City Council had decided to call the referendum the day after the suit was filed. The plaintiffs produced newspaper articles to show that voters were aware of the pending lawsuit and thought that the court was likely to rule in the plaintiffs' favor.

Again, the distinctions between *Kirksey* and this case are great: 1) the Board in this case did not initiate the referendum; 2) the referendum occurred only after this Court had affirmed the District Court's judgment that this case was without merit.

The Plaintiffs have cited no Seventh Circuit cases in support of their motion, and the two cases discussed above are incompatible with *Palmer*. But even assuming that this Court were to adopt the "catalyst" theory applied in those cases, there is no basis for the Court to conclude that these Plaintiffs were catalysts for the November 8 referendum. The Plaintiffs' claim that they actually won this lawsuit in the face of three adverse decisions is based entirely on facts not in evidence before either the District Court or this Court.

Moreover, the chronology of events shows that the Plaintiffs' implausible claim that their lawsuit was a catalyst is, as a matter of law, meritless. The Plaintiffs lost in the District Court on August 13, 1987, almost a year and a quarter before the referendum. They lost in this Court on July 8, 1988–four months before the referendum. The petition for a rehearing was denied on September 21, 1988. To attribute the successful referendum to this lawsuit would require this Court to find on the basis of Plaintiffs' conclusory non-record assertions that the voters of District 186 were aware that the Plaintiffs might file for certiorari and that, notwithstanding the unanimity of the District Court and this Court, the voters concluded that there was a substantial possibility that the Supreme Court would not only accept certiorari but would reverse this Court. Such far-fetched theorizing stretches cause and effect beyond that breaking point.

In sum, this Court has emphatically held that losers are not winners. The Plaintiffs have not cited a single case in which a plaintiff who lost in the district court and the appellate court was deemed a prevailing party. Their effort to have this court declare them prevailing parties is contrary to the facts of this case, to logic and to established law.

D. The Defendants Are Entitled To Attorneys' Fees

We ask the Court to award the Board its costs of responding to this motion, including reasonable attorneys' fees, under

Appellate Rule 38 and the Voting Rights Act. 42 U.S.C. 1973 1(e).

This Court has recognized that attorneys' fees may be awarded to a defendant when a claim is groundless, "clearly foreclosed by precedent" or lacks sufficient basis in fact. *Hamer v. County of Lake,* 819 F.2d 1362, 1367 (7th Cir. 1987). Here, the Plaintiffs have filed a motion which has no reasonable basis in law or fact and which is directly contrary to the law of this Circuit. They have asked this Court to consider evidence which is not on the record. They have not cited any Seventh Circuit decisions and have ignored the Seventh Circuit case which is directly contrary to their motion. Not a single case from any other Circuit or the Supreme Court plausibly supports their motion.

In accord with *Hamer* and other decisions of this Court, *see, e.g., District No. 8 International Ass'n. of Machinists & Aerospace Workers v. Clearing,* 807 F.2d 618 (7th Cir. 1986); *Hamilton v. Daley,* 777 F.2d 1207 (7th Cir. 1985), it is the responsibility of Plaintiffs' counsel to know that their claim is foreclosed by clear precedent. Here they have either knowingly ignored that responsibility or have been sloppy in fulfilling it and fees and costs are appropriate.

Further, the Plaintiffs' reliance on the Fifth Circuit's decisions in *Leroy* and *Kirksey* is unreasonable in view of the fact that, in contrast to the defendants in *Leroy* and *Kirksey,* the Board of Education took no action whatsoever in response to the lawsuit. Moreover, in stark contrast to the chronology in *Leroy* and *Kirksey,* the referendum of November 8 was passed exactly four (4) months after this Court had rendered its decision and approximately six (6) weeks after it rejected the Plaintiffs' motion for rehearing. The likelihood that Plaintiffs might prevail before the U.S. Supreme Court is much too speculative to permit a conclusion that the voters of Springfield regarded their lawsuit as a "substantial factor and a significant catalyst in the passage of the referendum." The Plaintiffs' motion, in short, has no foundation in law, is contrary to clear precedent and is not supported by any record facts. The Board should be awarded its fees and costs.

CONCLUSION

Plaintiffs ask this Court to vacate its decision and award them attorneys' fees as the prevailing party on the far-fetched theory that their losing efforts before the District Court and this Court were a "substantial factor" in a referendum over which the school district had no control and which did not result in the relief that the Plaintiffs have sought since they filed this suit in January of 1987. This Court's sparingly-used power to recall a mandate should not be used in this case.

Accordingly, the Board of Education of Springfield School District 186 respectfully requests that the Plaintiffs' motion to recall mandate and dismiss this case as moot be denied and that the Board be awarded its reasonable costs, including attorneys' fees, of responding to this motion.

Respectfully submitted,

SPRINGFIELD SCHOOL
DISTRICT NO. 186

By: /s/ ANDREA R. WAINTROOB

One of Its Attorneys

JAMES C. FRANCZEK, JR.
MICHAEL G. CLEVELAND
ANDREA R. WAINTROOB
VEDDER, PRICE, KAUFMAN & KAMMHOLZ
222 North LaSalle Street
Chicago, Illinois 60601
(312) 609-7500

JOHN L. SWARTZ
GIFFIN, WINNING, LINDNER,
COHEN & BODEWES
One West Old State Capitol Plaza
Suite 600
Springfield, Illinois 62701

Dated: December 21, 1988

APPENDIX - C

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

February 13, 1989

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. _____

Hon. _____

FRANK MCNEIL, et al., individually and as representatives of a certified class,

Plaintiffs-Appellants,

No. 87-2478 **vs.**

SPRINGFIELD PARK DISTRICT and SPRINGFIELD SCHOOL DISTRICT NO. 186,

Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois Springfield Division

Nos. 87 C 3017 and 87 C 3016

Judge Richard Mills

This matter comes before the court for its consideration of the following documents:

1. "MOTION TO RECALL MANDATE AND TO DISMISS THIS CAUSE AS MOOT" filed herein on December 8, 1988, by counsel for the plaintiffs-appellants.

2. "SPRINGFIELD PARK DISTRICT'S RESPONSE TO MOTION TO RECALL MANDATE AND TO DISMISS THIS CAUSE AS MOOT" filed herein on December 20, 1988, by counsel for the defendant-appellee, Springfield Park District.

3. "RESPONSE OF BOARD OF EDUCATION TO MOTION TO RECALL MANDATE AND DISMISS THIS CAUSE AS MOOT" filed herein on December 21, 1988, by counsel for the Springfield School District.

4. "RESPONSE OF SPRINGFIELD ELECTION COMMISSION TO MOTION TO RECALL MANDATE" filed herein on December 27, 1988, by counsel for the Springfield Election Commission.

On consideration thereof,

IT IS ORDERED that the MOTION TO RECALL MANDATE AND TO DISMISS THIS CAUSE AS MOOT is DENIED.

IT IS FURTHER ORDERED that Appellee Springfield School District No. 186's request for costs and attorneys' fees is DENIED.

No. 88-1378

Supreme Court, U.S.
FILED
APR 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

FRANK MCNEIL, *et al.*,
Petitioners,
v.

SPRINGFIELD PARK DISTRICT and
SPRINGFIELD SCHOOL DISTRICT NO. 186,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITIONERS' REPLY MEMORANDUM

FRANK R. PARKER
ROBERT B. MCDUFF *
BRENDA WRIGHT
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1400 Eye Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 371-1212

JAMES C. CRAVEN
DONALD M. CRAVEN
1005 North 7th Street
Springfield, IL 62705-1207
(217) 544-1777
Attorneys for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1378

FRANK MCNEIL, *et al.*,
Petitioners,

v.

SPRINGFIELD PARK DISTRICT and
SPRINGFIELD SCHOOL DISTRICT NO. 186,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITIONERS' REPLY MEMORANDUM

The brief of the respondent [1] does not spend much time discussing whether certiorari should nor should not be granted, but instead argues various points about the merits of the case which are not dispositive of the issue presented by the petition. The first three points made by the respondent are: (1) that the word "majority" in

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[1] Pursuant to Rule 19.6 of the rules of this Court, the Springfield School District No. 186 has indicated that it wishes to remain a party to this litigation despite the fact that it has abandoned its prior at-large election system. However, the school district waived its right to respond to the substantive questions presented by the petition for certiorari. Accordingly, this reply brief will refer only to the arguments of respondent Springfield Park District, which did file a brief addressing the substantive questions.

Thornburg v. Gingles, 478 U.S. 30 (1986), means voting age majority, Brief in Opp., pp. 4-8, (2) that respondent's position is supported by lower court case law, *id.* at 8-11, and (3) that summary judgment is sometimes appropriate in vote dilution cases. *Id.* at 12-16. These points are not dispositive in the sense that, even if respondent were correct on all of them, the respondent still would not have refuted the central contentions which support a grant of certiorari in this case: (1) that regardless of the definition of the word "majority," *Gingles* specifically left open the issue presented in this case, *see* Pet., pp. 9-15, and (2) that the *per se* rule adopted by the Court of Appeals is inconsistent with Congress' intent and is therefore wrong. *Id.* at 15-18.

The fourth, and only other, point made by the respondent is that the Court of Appeals' decision affects only so-called "marginal" cases where no effective remedy is available. Brief in Opp., pp. 16-18. Yet the respondent simply makes this assertion in a conclusory fashion, offers no supporting facts or analysis, and fails to rebut the petitioners' contention that this case involves a recurring issue, the resolution of which will affect a large number of minority voters. *See* Pet., pp. 18-22.

This reply brief will be organized around the four points made by the respondent in its brief in opposition. Before proceeding to those four points, however, it is important to note that the respondent never discusses what is absolutely crucial in this case of statutory construction: whether Congress intended the Voting Rights Act to incorporate the kind of strict *per se* limits imposed by the Seventh Circuit. The only reference to Congressional intent in the respondent's entire brief is an unsupported statement, made in passing, that reversal of the Seventh Circuit would violate Congress' wishes by leading to a right of proportional representation. That argument, plainly incorrect, is dealt with in Section I of this reply brief. *Infra* at 5 n.3.

I. EVEN IF THE WORD "MAJORITY" AS USED IN *GINGLES* REFERS TO VOTING AGE MAJORITY, *GINGLES* LEFT OPEN THE ISSUE IN THE PRESENT CASE OF WHETHER MINORITY CITIZENS CAN EVER CHALLENGE AT-LARGE ELECTIONS WHERE THEY WOULD BE LESS THAN A MAJORITY OF THE VOTING AGE POPULATION IN A SINGLE-MEMBER DISTRICTING PLAN.

The respondent makes much of the contention that the word "majority" as used in Justice Brennan's opinion in *Gingles* meant voting age majority. Brief in Opp., pp. 4-8. Of course, Justice Brennan's opinion never said "voting age majority," but simply said "majority." In the present case, black citizens would make up a majority of the total population of a single-member district.

Even if Justice Brennan unequivocally intended the word "majority" to mean voting age majority, that does not refute the fact that *Gingles* did not confront, and specifically left unresolved, the question of whether a claim against at-large elections under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, can ever be maintained when minority citizens would be less than a majority of the voting age population in a single-member districting plan. 478 U.S. at 46-47 n.12, and 48-50; *id.* at 89-90 n.1 (O'Connor, J., concurring). The different ways in which *Gingles* left this question open are discussed in detail at pp. 11-15 of the petition for certiorari.

With respect to the use of the word "majority" in *Gingles*, it is important to recognize that Justice Brennan's opinion was talking about whether minority citizens would have a "*potential* to elect" candidates of their choice in a single-member remedial plan. 478 U.S. at 50 n.17 (emphasis in original). Showing that minority citizens would constitute a majority in a single-member district may be the paradigmatic way of demonstrating the potential to elect. But, as is clear from the qualifiers,

reservations, and analysis contained both in Justice Brennan's and Justice O'Connor's opinions, *see* Pet., pp. 11-15, *Gingles* left open the possibility of demonstrating a potential to elect even with something slightly less than a majority of the voting age population. Thus, the use of the word "majority" in Justice Brennan's opinion does not foreclose the claim made by the black citizens of Springfield, Illinois in this case, or similar claims of racial discrimination made by other minority citizens around the country.

The respondent contends that a majorty of voting age population is *always* necessary to demonstrate a potential to elect candidates of choice. Brief in Opp., p. 7 ("[o]nly a majority of those eligible to vote can establish the potential to elect"); *id.* at 8. This is refuted by the very text of *Gingles* itself, which indicates that a number of factors other than the racial composition of a jurisdiction are relevant to an ability to elect. 478 U.S. at 55-56.[2] Moreover, if respondent were correct that anything less than 50% voting age population is never sufficient for minority voters to have a potential to elect, all at-large election systems in majority white jurisdictions would be unlawful *per se* under Section 2. This is because minority voters, comprising less than 50% of the voting age population in those jurisdictions, would be presumed unable to elect candidates of choice under the at-large systems. That sort of legal result would be contrary to the intent of Congress and the statement of this Court

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[2] These factors include the extent of bloc voting; the presence or absence of majority vote requirements, designated posts, and prohibitions against bullet voting; the percentage of minority voter registration and turnout in the district; the size of the district; the number of candidates in the field; and, in multimember districts, the number of seats open. 478 U.S. at 55-56. Pages 7-8 of the brief of *amici curiae* in support of the petition for certiorari outline a number of ways in which minority voters can elect candidates of choice even with something short of a majority of the voting age population in a given district.

in *Gingles* that at-large elections are not automatically violative of Section 2. 478 U.S. at 46.[3]

II. THE STATE OF THE LOWER COURT CASE LAW, AND THE FREQUENCY WITH WHICH THIS ISSUE ARISES, JUSTIFY A WRIT OF CERTIORARI TO RESOLVE THE ISSUE.

Respondent attempts to paint a monolithic picture of lower court decisions both pre- and post-*Gingles* uniformly reaching the same holding as the Seventh Circuit in this case. Brief in Opp., pp. 8-10, 12-13. While it is certainly true that a number of other lower courts have joined the Seventh Circuit in limiting the scope of Section 2 when faced with this issue, *see* Pet., pp. 19-20, the matter is not as free of conflict as respondent suggests. Three points deserve mention.

First, a number of the cases cited by respondent, Brief in Opp., pp. 10, 12-13, did not even remotely address the issue which is presented in this case. These include *Collins v. City of Norfolk*, 816 F.2d 932 (4th Cir. 1987); *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988), *cert. pending*, No. 88-606; *Buckanaga v. Sisseton Independent School District No. 54-5*, 804 F.2d 469 (8th Cir. 1986); *Gomez v. City of Watsonville*, 863 F.2d 1407

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[3] Respondent does not discuss Congressional intent on this point, or any other, except to say that reversal of the Seventh Circuit would violate Congressional will by instituting proportional representation. Brief in Opp., p. 18. Respondent seems to miss the point that all plaintiffs seek at this stage of the case is a decision that would reverse the summary judgment and allow them a trial of their racial discrimination claim. Plaintiffs would still have to prove at trial that the current at-large system dilutes their voting strength, and they could not meet that burden simply by showing that minorities have failed to achieve proportional representation in Springfield. *See Thornburg v. Gingles*, 478 U.S. at 46. Thus, the plaintiffs are not claiming a *per se* right to proportional representation, and reversal of the Seventh Circuit would in no way establish such a right.

(9th Cir. 1988); and *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987), *cert. denied*, 108 S.Ct. 1111 (1988).

Second, both pre- and post-*Gingles* cases indicate some conflict with the *per se* standard utilized by the Seventh Circuit in the present case. *See East Jefferson Coalition v. Parish of Jefferson*, 691 F. Supp. 991, 1005-1008 (E.D. La. 1988); *Major v. Treen*, 574 F. Supp. 325, 330-336, 351-352 (E.D. La. 1983) (three-judge court); *Wilkes County, Georgia v. United States*, 450 F. Supp. 1171 (D.D.C.) (three-judge court), *aff'd*, 439 U.S. 999 (1978).[4] Thus, this is an issue about which disagreement does exist in the courts.[5]

Third, the respondent's discussion of the lower court cases only reiterates the point at pp. 18-22 in the petition for certiorari that the present case involves an issue which arises frequently in the lower courts, and is in need of resolution by this Court.

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[4] The *East Jefferson* case is discussed at p. 21 of the petition for certiorari, and *Major v. Treen* and *Wilkes County* are discussed at pp. 5-6 n.3 of the brief *amici curiae* in support of the petition. Respondent's suggestion that *East Jefferson* and *Major* may be distinguishable because they were remedy cases and not liability cases, Brief in Opp., p. 14, is totally wrong. The reported decisions in both cases dealt with the liability phase of the case. Respondent never explains its further contention that, because *Major* was a "redistricting" case, its holding is somehow inapplicable to the issue of a minority group's potential to elect in a remedial plan. *Id.*

[5] The conflict over this issue is reflected not only in lower court decisions, but also in the scholarly criticism of the rule adopted by the Court of Appeals in this case. *See* the citations at p. 21 of the petition for certiorari.

III. THAT SUMMARY JUDGMENT MAY BE APPROPRIATE IN SOME SECTION 2 CASES DOES NOT ANSWER THE QUESTION OF WHETHER THE SEVENTH CIRCUIT'S NARROW *PER SE* STANDARD IS AN APPROPRIATE BASIS FOR GRANTING SUMMARY JUDGMENT.

The third section of the respondent's brief is devoted to the concept that summary judgment may be appropriate in some Section 2 cases. Brief in Opp., pp. 12-16. The petitioners do not quarrel with that, *see* Pet., p. 14 n.7, but simply contend that the Seventh Circuit's mechanistic *per se* standard for summary judgment conflicts with Congressional intent, *id.* at 15-18, and with the rationale of *Gingles*. *Id.* at 13-14.

In this same section of its brief, the respondent asserts that the petitioners' claim is "tied specifically" to footnote 12 of *Gingles*, which discusses an "ability to influence elections," and also asserts that the record is inadequate for review of an "influence" claim. Brief in Opp., pp. 13-14. This is wrong in several respects.

First, the petitioners' contention that *Gingles* left this issue open is not "tied" only to footnote 12, but stems from footnote 12 and a number of other aspects of *Gingles*' language, structure, and analysis, all of which are detailed at pp. 11-15 of the petition for certiorari.

Second, the evidence presented by petitioners in the district court in response to the motion for summary judgment demonstrates that black citizens could *elect* candidates of their choice in the proposed single-member district, where they would be under a majority in voting age population but over a majority in total population. *See* Pet., pp. 4-5. Whether that makes this an "ability to influence" case or an "ability to elect" case is immaterial to the larger point that this raises an issue which has yet to be resolved by this Court.

Third, the respondent in no way explains how the record in this case is "inadequate" for resolution of the

issue. Clearly, the record demonstrates, sufficient to survive summary judgment, that minority citizens in the proposed district can elect candidates of choice,[6] and the only question before this Court is the legal question of whether minority citizens are automatically precluded from the coverage of Section 2 where they constitute anything less than a majority of the voting age population in a remedial plan. That question is presented squarely by this case, and should be resolved in the context of this case.

IV. AS THE RECORD IN THE PRESENT CASE DEMONSTRATES, THE DECISION OF THE COURT OF APPEALS EXCLUDES MERITORIOUS RACIAL DISCRIMINATION CLAIMS WHERE AN EFFECTIVE REMEDY IS AVAILABLE.

The respondent claims, rather briefly and without any supporting analysis, that this issue will encompass only marginal cases where no effective remedy is available. Brief in Opp., pp. 16-17. Of course, that assumes the conclusion that a district with less than 50% minority voting age population can never allow minority voters to elect candidates of choice, and therefore is *per se* ineffective.

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[6] Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment should be granted if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." The evidence presented by the petitioners in response to the motion for summary judgment shows, at the very least, a genuine issue of fact suggesting that minority citizens can, as a practical matter, elect candidates of choice from the proposed district. Thus, the only remaining question is whether that fact is *material*. If, as the Seventh Circuit held, minority citizens can never invoke Section 2 unless they are over 50% of the voting age population in a single-member district alternative, then the practical ability to elect in the proposed district would not constitute a material fact. If, on the other hand, the 50% voting age population figure is not a *per se* and unalterable bar to Section 2 claims, then that fact is material, and plaintiffs are entitled to a trial.

The respondent's argument is belied by the facts of the present case. In election after election, black candidates supported by the overwhelming majority of black voters have won in the precincts comprising the proposed district. Pet., pp. 4-5. Thus, if petitioners ever receive a trial, and are able to demonstrate that the existing at-large system prevents them from electing candidates of choice, there is no question but that the alternative single-member district will give them that opportunity and will be an effective remedy.

By focusing simply on whether or not a 50% voting age majority can be obtained in a single-member district, the Seventh Circuit's rule fails to differentiate between the marginal and the meritorious cases, between the cases where an effective remedy is available and those where it is not.[7] All the petitioners are asking this Court to do is review the Seventh Circuit's *per se* rule and determine whether factors other than the 50% voting age population figure should be considered in evaluating

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[7] Respondent states that a bright line 50% voting age population rule is necessary to prevent judges from relying on "raw intuition" and "judicial speculation" in deciding both the liability and remedy phases of vote dilution cases. Brief in Opp., p. 17. That is simply wrong. Congress gave the courts extensive guidance regarding the relevant evidentiary factors to be examined in connection with what Section 2 calls the "totality of circumstances." S. Rep. No. 97-417, 97th Cong., 2d Sess., at 28-29 (1982) (report of the Senate Judiciary Committee on the 1982 Voting Rights Act extension), *reprinted in* 1982 U.S. Code Cong. & Admin. News 177. But nowhere did Congress prescribe or suggest such a bright-line rule. Moreover, in order to determine whether an ability to elect exists in a proposed remedial district in a case like the present case, courts need simply look at the electoral patterns, such as the election returns showing that the candidates of choice of black voters in Springfield won in the precincts comprising the proposed district. Pet., pp. 4-5. That is not "raw intuition," but instead reflects the type of analysis which courts make of the electoral reality in a given jurisdiction in any Section 2 case. *See Thornburg v. Gingles*, 478 U.S. at 55-56 (listing a number of relevant factors to be examined by judges in deciding Section 2 claims).

the viability of a racial discrimination challenge under Section 2.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

FRANK R. PARKER
ROBERT B. MCDUFF *
BRENDA WRIGHT
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1400 Eye Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 371-1212

JAMES C. CRAVEN
DONALD M. CRAVEN
1005 North 7th Street
Springfield, IL 62705-1207
(217) 544-1777
Attorneys for Petitioners

* Counsel of Record